The Madras Law Journal

I] REPORTS [1974

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—*N. S. Ramaswami, J.*

The Union of India represented by the Regional Director (Food), Southern Region, Madras .. *Plaintiff**

v.

Cheyenna Compania Naviera S. A. represented by its Agent Messrs. Panagotis A. Lemas and Associates Ltd. and another .. *Defendants.*

Carriage of goods by sea—Chartered vessel carrying goods from Houston port (U.S.A.) to Madras port—Shortage in delivery—Carrier's liability—Mate's receipt—Probative value—Certificate issued regarding weight of cargo by International Testing Laboratory—Value—Commercial Documents Evidence Act (XXX of 1939), *section* 3 (b) *and item* 6, *Part II of the schedule—Effect—Burden of proof as to reason for shortage—Neither inherent vice nor peril of the sea made out—Award of damages—Calculation—Relevant factors—Madras agent of carrier not liable.*

A mate's receipt is *prima facie* evidence regarding the quantity and condition of the cargo shipped in a vessel, though it is not conclusive evidence. [*Paras.* 6 *and* 7.]

A certificate given by an international body—the Shilstone Testing Laboratory showing the weight of the cargo as certified by the certified weight-master comes under the Commercial Documents Evidence Act, 1939, and would be *prima facie* evidence regarding the weight of the cargo shipped in the vessel.

[*Para.* 8.]

If the goods-owner proves that the consigned goods have not been delivered or have been damaged after shipment, the onus shifts to the carrier to bring the cause of damage within one or other of the exceptions under which he will be exonerated from liability.

[*Para.* 13.]

When it is proved that the shortage was during voyage, it is for the carrier to plead and prove any of the grounds of exemption from liability available to him.

[*Para.* 15.]

In the absence of evidence of any peril of the sea or some inherent vice in the goods the carrier cannot be absolved from liability for the shortage.

[*Paras.* 12 *and* 14.]

The carrier's agent at Madras cannot be made liable. [*Para.* 16.]

In assessing the value of the shortage in weight in delivery of the goods consigned from the United States to Madras it is the exchange value of the dollar as at the time of short-delivery or breach that alone will be applicable. [*Para.* 17.]

Where the evidence showed that there might have been spillage and wastage of some of the goods at the time of their discharge from the ship, to be on the safe side, 25% of the short-landed goods may be omitted in the calculation of the plaintiff's damages. [*Para.* 18.]

Cases referred to :—

Nippon Yusen Kaisha v. *Ramjiban Serowgee*, (1938) A.C. 429 (P.C.); *Paterson Steamships* v. *Canadian Wheat*, (1934) A.C. 538.

C. Rangaswami Iyengar, and the Standing Counsel, for the Central Government, for Plaintiff.

King and Patridge, for Defendants.

The Court delivered the following

JUDGMENT.—The Union of India, represented by the Regional Director (Food),

* O.S. No. 174 of 1966. *20th October*, 1971.

Southern Region, Madras, has filed the suit for the recovery of a sum of Rs. 1,16,995.50 said to be the value of 247.071 M.T. of Ammonium Sulphate short-landed by the first defendant which is a shipping company. The plaintiff imported ammonium sulphate from the Port of Houston, Texas, U.S.A., to Madras by 'Dr. Antonis Lemos' the ship of the first defendant company. Exhibit P-1 dated 3rd June, 1965 is the charter party between the plaintiff and the first defendant. 'Dr. Antonis Lemos' is the vessel which had been chartered and it was in that vessel the consignment of ammonium sulphate was shipped from the Port of Houston. Exhibit P-2 dated 7th July, 1965 is the bill of lading issued by the first defendant. It was a bulk cargo and the vessel carried only the said cargo and nothing else. The manifested quantity of the cargo, namely, ammonium sulphate is 10,491.686 M.T. which is equal to 11,564.986 short tons. The ship arrived at the Madras Port on 24th August, 1956. The discharge of cargo commenced on 29th August, 1965 and was completed on 8th September, 1965. The plaintiff had been taking delivery which was completed on 9th September, 1965, that is, just a day after the completion of the discharge. According to the plaintiff, the total quantity of ammonium sulphate discharged by the vessel was only 10,244.615 M.T. while the manifested quantity is 10,491.686 M.T. Thus, there was a shortage of 247.071 M.T. According to the plaintiff, the first defendant, the shipping company, which is the carrier, is bound to pay the value of the abovesaid short-landed ammonium sulphate, because the shortage was due to the fact that the first defendant neglected and failed to exercise due care and diligence in respect of the said cargo in its loading, handling, carrying etc. The value of the abovesaid 247,071 M.T. at 47.65 dollars per metric ton is said to be 11,772.93 dollars. To this, the freight and 1% insurance is added thus making a total of 15,599.40 dollars. The plaintiff claims the abovesaid amount in its rupee equivalent at Rs. 7.50 per dollar and thus, the suit amount of Rs. 1,16,995.50 is arrived at. The second defendant is the Madras agent of the first defendant. It is stated in the plaint that the second defendant is also liable to pay the abovesaid amount.

2. The first defendant in its written statement has put the plaintiff to strict proof regarding the actual quantity of ammonium sulphate shipped in the vessel. It denied that the ship short-landed at Madras Port 247.071 M.T. of ammonium sulphate. The plaintiff's case that the shortgage was due to the negligence or want of due care and diligence etc., on the part of the first defendant is specifically denied. It is pointed out that as per the terms of the charter party, the entire handling operations, namely, loading, stowing, trimming, and discharging the cargo were carried out only by the plaintiff or their agents and that the first defendant had no part in such operations and that it merely carried the cargo from the Port of Houston to Madras. It is stated that the shortgage, if any, is therefore, due to the negligence of the plaintiff or its agents, stevedores and servants. It is further claimed that the first defendant's liability as carrier ceased once the cargo is off the ship's side and that the first defendant cannot be held liable for any loss or damage to the cargo after landing and before weighment. The written statement further proceeds to say that before the cargo was discharged, a hatch survey was held at Madras Port, and it was found by that survey that the plaintiff's cargo was intact in the holds of the ship and that therefore, the defendant cannot be held liable for the shortage. Then it is stated that the shortage, if any, might be due to inherent vice in ammonium sulphate, as it has a tendency to disintegrate (watered down) in damp atmosphere. According to the first defendant its vessel experienced rough and heavy weather during the voyage and on account of that it was possible that a portion of the cargo might have watered down resulting in loss in weight. The first defendant also claimed the immunities provided under section 4, rule 2 (*c*), (*m*) and (*q*) of the U.S. Carriage of Goods by Sea Act, 1936.

3. The further case is that even if the plaintiff is entitled to the value of the alleged short-landed cargo, it cannot claim the rupee equivalent of the C.I.F. value of the cargo at the exchange rate as on the date of suit, but only at

the exchange rate as on the date of discharge of the cargo. It may be noted that the Indian rupee was devalued in June, 1966. This transaction was in 1965. So it is stated that the exchange rate which was then prevailing, namely, Rs. 4.50 per one U.S. dollar should be the one that is applicable and, that therefore in any event the plaintiff would not be entitled to the amount claimed which is on the basis of the present exchange value, namely, Rs. 7.50 per U.S. Dollar.

4. The second defendant, namely, the Madras agents of the first defendant has filed a similar statement as that of the first defendant and added that it cannot be held liable for the suit claim as it had only acted as the agent of the first defendant.

5. The following issues were set for trial:

1. What was the actual quantity of cargo of the plaintiff that was shipped at the Port of Houston by the first defendant's vessel?

2. Was there a short-landing of 247.07 M.T. of ammonium sulphate by the first defendant's vessel at Madras?

3. What is the value of the cargo short-landed?

4. Did the defendants' liability cease once the cargo was off the ship's side?

5. Is the shortage due to any negligence of the plaintiffs themselves or due to the inherent nature of the cargo?

6. Does the charter-party agreement dated 3rd June, 1965 form part of the contract of carriage between the plaintiff and the first defendant and are the parties bound by its terms and conditions?

7. Is not the subject contract of carriage governed by the U.S. Carriage of Goods by Sea Act, 1936 ?

8. Are the defendants entitled to rely on the immunities provided under section 4, rule 2 (*c*) (*m*) and (*q*) of the U.S. Carriage of Goods by Sea Act, 1936 in defence of the suit claim?

9. Is not the plaintiff entitled in law to claim only the rupee equivalent of the C.I.F. value of cargo at the exchange rate which prevailed at the time the alleged breach (short delivery) occurred (*i.e.*) at the exchange rate of Rs. 4.50 per U.S. dollar?

10. Are the defendants liable for the suit claim and if so, to what extent ?

11. To what relief, if any, are the plaintiffs entitled?

6. From the evidence on record I find no difficulty in holding that 10,491.686 M.T. of ammonium sulphate was received by the first defendant on board the ship 'Dr. Antonis Lemos' at the Port of Houston on 7th July, 1965. Exhibit P-2 the bill of lading shows the weight of the cargo as declared by the shipper, namely, the plaintiff and that is given as 10,491.686 M.T. and 11,564.985 short tons. The bill of lading says that the goods were shipped in apparent good order and condition by India Supply Mission (who acted for the plaintiff) on board the ship 'Dr. Antonis Lemos'. It further says that the goods were to be delivered in like good order and condition at the Port of destination in India as per the terms of the charter-party. Then further down in the bill of lading there are printed conditions. Condition No. 3 says "3. Shipper's weight, quantity and quality unknown". Because of this, the contention on behalf of the defendants is that this document, namely, the bill of lading is not even *prima facie* evidence regarding the quantity that was shipped. It is not seriously disputed by the learned Counsel for the plaintiff that the bill of lading in this case would not help in proving the actual weight of the ammonium sulphate shipped in the vessel. But two other documents are relied on by the plaintiff in order to show that 10,491.686 M.T. were actually shipped in the vessel at the Port of Houston. Exhibit P-17 is the mate's receipt issued to the plaintiff as soon as the shipping company took charge of the cargo. That gives the weight of the ammonium sulphate shipped in each of the five holds of the ship, the total of which is shown as 11,564.985 short tons. It cannot be disputed that this document is *prima facie* evidence regarding the weight of the cargo shipped in the vessel.

7. In *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*[1], the question was regarding the

1. (1938) A.C. (P.C.) 429.

ownership of the goods shipped in a particular vessel, because the sellers of the goods had retained the mate's receipt in their capacity as unpaid vendors. In dealing with this question, it was observed by the Privy Council at page 445, thus:

> "The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, *prima facie* evidence of the quantity and condition of the goods received, and *prima facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him".

The observation that the mate's receipt is *prima facie* evidence regarding the quantity and condition of the goods received is worth noting. In Carver's British Shipping Laws (Vol. 2, page 87 note 89) it is stated that a shipowner is not estopped from denying the truth of statements in a mate's receipt, even apparently though they relate to the condition and not to the quantity, of the goods shipped. This note further quotes the observation of the Privy Council in the above reported case. Therefore, it is clear that a mate's receipt is *prima facie* evidence regarding the quantity of the goods received by the ship owner. Of course, it is not conclusive evidence and the shipowner would certainly be entitled to deny the truth of the statement made in the mate's receipt in which event the ship-owner has to lead evidence rebutting the *prima facie* evidence provided by the receipt itself. This position is not seriously disputed by the learned Counsel for the defendants.

8. There is yet another document on which the plaintiff places reliance and that is Exhibit P-5 dated 8th July, 1965, which is a certificate given by Shilstone Testing Laboratory showing the weight of the cargo as given by the certified weight master. This certificate shows that the weight of the cargo was 10,491.686 M.T. This is also a document which would come under the Commercial Documents Evidence Act (XXX of 1939). Section 3 (*b*) of that Act says that the Court may presume, in relation to documents included in Part II of the schedule, that it had been duly made as purported to have been made in the document and that the statements contained therein are accurate. Item 6 of Part II of the schedule to that Act, refers to certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer or by a recognised Chamber of Commerce". That Shilstone Testing Laboratory which had issued the receipt Exhibit P-5 is an international body has not been disputed by the defendants. All that is stated in the written statement is that such certificate is not binding on the defendants. No doubt the certificate would not bind the defendants. But the point is whether it cannot be relied on by the plaintiff as *prima facie* evidence regarding the weight of the cargo shipped in the vessel. I am quite clear that this document can also be relied on by the plaintiff regarding the weight. Even apart from this document, there is the mate's receipt Exhibit P-17 which was already referred to and that is certainly *prima facie* evidence regarding the weight. Therefore, the fact that the bill of lading is not helpful to the plaintiff as evidence regarding the weight of the cargo shipped does not mean that the plaintiff has no evidence to prove the weight. No doubt the mate's receipt provides only *prima facie* evidence regarding the weight. But in the absence of any evidence contra I see no reason why the Court should not act upon that document. It is significant to note that the defendants have not let in evidence either oral or documentary. Surely, the fact that there is a printed clause in Exhibit P-2, the bill of lading that "shipper's weight quantity and quality unknown" would in no way affect the value of the mate's receipt. As a matter of fact, the learned Counsel for the defendants does not contend that Exhibit P-17, the mate's receipt is not even *prima facie* evidence. Under these circumstances, I have no hesitation to hold that 10,491.686 M.T. of ammonium sulphate (11,564.985 S.T.) was shipped in the vessel.

9. Then the question is whether there was short-landing, if so, to the extent of 247.07 M.T. as claimed by the plaintiff. R. Srinivasan, District Manager, Food Corporation of India, who was then the Assistant Director in the office of the Regional Director (Food), Southern Region, Madras, was in charge of clearance of the suit cargo, and he has given evidence as P.W. 2. David Mathan P.W. 1 was the shed-master in the west quay of the Madras Port during the relevant period and it was in that quay the suit cargo was discharged. This witness as well as P.W. 2 have spoken about the manner in which the cargo was discharged and ultimately taken delivery of by the plaintiff. Exhibit P-18 is the import application with certificate. This gives the details of the cargo discharged and taken delivery of by the plaintiff. Exhibit P-12 is the out-turn statement given by the Port Trust. This shows that the quantity manifested was 10491.686 M.T. and the quantity delivered was only 10,244.615 M.T. It is pointed out by the learned Counsel for the defendants that the out-turn statement is not a statutory document and therefore, that cannot be relied on in the same way as tally sheets prepared at the time of the discharge of cargo. In this case no tally sheet was prepared because it is bulk cargo and only out-turn statement was given by the Port Trust. It is true that the preparation of the tally sheet is a statutory obligation on the part of the Port Trust; but it is not so with regard to the out-turn statement. But in this case apart from the out-turn statement, the plaintiff has filed the import application with its certificate (Exhibit P-18) which shows the details of the goods discharged and taken delivery of. The evidence of P.W.s. 1 and 2 goes to show that the entire goods discharged from the vessel had been weighed by the Port Trust before the same was delivered to the plaintiff. Under these circumstances, there is no reason to disbelieve the plaintiff's case that only 10,244.615 M.T. was delivered.

10. It is suggested on behalf of the defendants that even in the process of discharge of the cargo from the vessel, there was chance of spillage and that might have resulted in the shortage. Even assuming that there would be some spillage, it is not possible to hold that 247 M.T. of ammonium sulphate would have been lost by such spillage.

11. There is also nothing to show that after the goods were discharged from the vessel and before the same was taken delivery of by the plaintiff, there was any loss. This is not a case where the goods were allowed to lie in the sheds of the Madras Port Trust for any length of time. The process of taking delivery of the goods was going on as the goods were being discharged from the vessel and as a matter of fact the delivery of the goods to the plaintiff was completed almost simultaneously with the discharge of the goods. The evidence discloses that while the discharge was completed on 8th September, 1965, the plaintiff took delivery of the entire quantum that was discharged by 9th September, 1965. Though it had been stated in the written statement that once the goods are off the ship's side, the liability of the carrier ceases, that was not the case put forward at the time of the trial. At the time of the trial it was not even suggested that there might have been any loss or damage to the cargo after it was landed and before it was weighed by the Port Trust.

12. There is nothing to show that the shortage was due to any inherent vice in the goods. Even as per the averments in the written statement the cargo, namely, ammonium sulphate is likely to disintegrate only in damp atmosphere. It is not stated in the written statement that in any event the cargo is likely to disintegrate after a particular period. The written statement further suggests that it was possible that a portion of the cargo had disintegrated (watered down) due to the fact that it was exposed to dampness as a result of heavy weather experienced during the voyage. In this statement there is an admission that during voyage the cargo became damp and that might be the reason for the shortage. It is certainly a reason for the shortage. It is certainly the duty of the carrier to see that the cargo is not exposed to dampness. Of course, if such dampness is as a result of perils of sea or act of God, the carrier can escape liability. But there is nothing on record to show that this exposure of the cargo to dampness

was as a result of circumstances beyond the control of the carrier. Though it is stated in the pleadings that there was heavy weather during voyage and that a protest to that effect had been made by the Master of the ship, no attempt has been made to prove this averment. Further, I am of the view that heavy weather cannot be equated to perils of sea or act of God because that is only a normal incident of sea voyage. Under these circumstances, I think even on the defendants' own showing it must be, held that the cargo had been exposed to damp atmosphere during voyage. The averment in the written statement that on the ship being berthed at Madras Port and before the cargo was discharged there was a hatch survey and that revealed that the holds of the ship were intact has again not been proved. For reasons best known to themselves the defendants have not chosen to file the hatch survey report. Therefore, one does not know whether the holds had been properly and securely closed during voyage and whether they were intact when the ship berthed at Madras Port. As pointed out by Carver, the common law with regard to the liability of a public carrier of goods, is strict, and apart from express contract he is, with certain exceptions, absolutely responsible for the safety of the goods while they remain in his hands as carrier. Lord Wright, delivering the judgment of the Privy Council in *Paterson Steamships v. Canadian Wheat*[1], said:

> "At common law, he was called an insurer, that is, he was absolutely responsible for delivery in like order and condition at the destination of the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies."

Even when the carrier can plead one or other of the exceptions he will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them; or to guard against their possible effects or to arrest their consequences. In a case where a cargo was damaged by water escaping from a boiler pipe cracked by frost,it was held that the loss was occasioned by the negligence of the master in leaving the boiler full on a cold night, and that the common law exception of act of God did not therefore avail the cargo owner.

13. As observed by Carver at page 227 (note 267) if the goods-owner proves that the goods have not been delivered or have been damaged after shipment, the onus shifts on to the carrier to bring the cause of damage specifically within Article 4, rule 2. In the present case the U.S. Carriage of Goods by Sea Act, 1936 is applicable. Though at the time of the framing of the issues, there seems to have been a dispute it is now conceded by the plaintiff that the parties are governed by the U.S. Carriage of Goods by Sea Act, 1936,as stated by the defendants. Section 4, rule (2) in that corresponds to Article 4 (2) referred to above. The defendants rely on the immunities provided under section 4, rule (2) (*c*) (*m*) and (*q*) of U.S. Carriage of Goods by Sea Act. Section 4 (2) says that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from..

> "(*c*) Perils, dangers, and accidents of the sea or other navigable waters;....
>
> (*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;........
>
> (*q*) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

14. I have already pointed out that there is no evidence regarding the perils of the sea having been responsible for the damage to the goods. I have also indicated that there is nothing to show that the damage is due to inherent vice in the goods. It may be that ammonium sulphate is likely to disintegrate if it is exposed to damp weather. Even so, it is for the defendants to show that such

1. (1934) A.C. 538.

exposure was not due to their fault. Therefore, clause (*m*) is also not available to the defendants. Under clause (*q*) the burden of proof would be on the defendants in this case, if they claim the benefit of that exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. Further this clause can have no application because it is not shown that the damage was due to any other cause arising without the actual fault and privity of the carrier.

15. The learned Counsel for the defendants contends that the vessel having been chartered to carry only the plaintiff's goods it had no necessity to discharge any cargo at any other port and that, therefore, there was no chance of pilferage or interference with the said cargo *en route*. But this fact, namely, that the ship carried only the suit cargo and nothing else and there was no cargo to be discharged at any other port, would not help the defendants. When it is proved that the shortage is during voyage it is the defendants' duty to plead and prove any of the exceptions available to them. I do not believe that any of the exceptions is applicable in this case. On the contrary, the court would be justified in inferring that the damage to the goods should have been due to negligence on the part of the defendants because there is an admission by the defendants that the goods had been exposed to dampness during voyage.

16. Under the above circumstances, the first defendant, namely, the carrier, would certainly be liable to make good the shortage. However, the second defendant, who is only the Madras agent of the first defendant cannot be made liable.

17. Though the plaintiff has claimed the value of the shortage at the present exchange value of the U.S. dollar, it is not seriously disputed that the exchange which prevailed in 1965, that is, at the time of the short delivery, would alone be applicable. Then one U.S. dollar was equal to Rs. 4.50. It was at that rate the plaintiff originally made its claim in Exhibit P-14, dated 2nd March, 1966. The claim then was for a sum of Rs. 70,927.84 towards the value of the 247.071 M.T. of ammonium suplhate. *S.S. Chella* v. *S.S. Volturno*[1] is an authority for the proposition that the exchange rate at the date of the breach alone should govern.

18. Lastly, the question is whether the plaintiff would be entitled to the value of the entire 247.071 M.T. of ammonium sulphate short-landed, or only to something less. On a careful scrutiny of the evidene of P.W. 1 the Shed Master of the Port Trust, it is seen that there might have been some spillage at the time of the discharge of the goods. But such spillage could have been only of a small quantity. I am of the view that to be on the safe side 25 per cent. of the short landed goods may be omitted from calculation of the plaintiff's damages, on the ground that there might have been some spillage or wastage of the goods during the process of discharge and delivery as well as in the process of loading the cargo in the U.S. Port.

19. I hold, therefore, on issue 1 that the actual quantity of cargo shipped at Port of Houston was 10,491.686 M.T. as claimed by the plaintiff;

on issue 2, that there was short-landing of 247.071 M.T.;

on issue 3 that the value of the cargo short-landed is Rs. 70,927.84;

on issues, 4 and 5 against the defendants;

on issues, 6 to 8 in favour of the defendants as conceded by the plaintiff;

on issue 9 that the exchange rate has to be taken as one dollar is equal to Rs. 4.50;

on issue 10 against the plaintiff; and

on issue 11 that the first defendant alone is liable to pay Rs. 53,195.88 to the plaintiff.

20. In the result, there will be a decree in favour of the plaintiff, against the first defendant alone for the recovery of a sum of Rs. 53,195.88 with proportionate costs. The suit is dismissed as against the second defendant, without costs.

P.S.P. *Suit decreed against 1st defendant and dismissed against 2nd defendant.*

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1. (1921) 2 A.C. 544.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—*N.S. Ramaswami, J.*

The Corporation of Madras, by its Executive Authority, The Commissioner, having its Office at Ripon Buildings, Park Town, Madras-3 .. *Plaintiff**

v.

Ratanlal Fomra and others .. *Defendants.*

and

Fomra Brothers by Partner Kanhyalal Fomra, carrying on business at No. 392, Mint Street, G. T., Madras. .. *Plaintiffs*

v.

The Corporation of Madras, by its Commissioner, having his office at Ripon Buildings, Madras-3 .. *Defendant.*

(A) *Contract Act* (*IX of* 1872), *section* 230—*Disclosed principal—Tender and acceptance clearly showing that dealings should be with principal direct—Agent signing formal prescribed form contract without mention of his representative capacity—Effect—Suit for damages for breach of contract—Person liable.*

(B) *Evidence Act* (*I of* 1872), *section* 92—*Agent signing formal prescribed form contract—Capacity in which he signed—Terms of tender and letter of acceptance—Not evidence* aliunde—*Admissibility.*

Where a tender specifically stated that order for the goods must be placed with the principal at Bombay and payments were to be made directly to the principal and the 'time' of delivery was tentative, subject to *force majeure* conditions including shortage of raw materials, breakdown in machinery, labour strikes and also availability of electrical energy, a suit for damages for alleged breach of contract cannot be enforced against the agent, though the latter had signed the printed contract without indicating that he was signing as agent. [*Paras.* 3 *and* 11.]

In such a case it will not be correct to say that the printed form contract entered into subsequently should be deemed to have superseded the other documents *viz.*, the tender and the acceptance letter. [*Para.* 7.]

The tender as well as the acceptance of the tender formed part of the contract.

Where the agent was not trying to lead extraneous evidence in support of his case, and relied upon the terms of the contract themselves to prove the case, it cannot be held that the formal contract was the only document evidencing the contract and that the agent in relying on the terms of the tender and the acceptance thereof was trying to lead evidence *aliunde* to show that he did not contract on his own behalf. Such evidence cannot be shut out as infringing section 92 of the Evidence Act. [*Para.* 11.]

Where an agent has taken the defence that he was not personally liable and had only acted for a disclosed principal any suit by the agent in his individual capacity for recovery of the value of the goods supplied to the other party is not maintainable as per section 230 of the Contract Act. The agent is not only not personally bound by the contract, but also cannot personally enforce the contract. [*Para.* 12.]

Cases referred to :—

The South Indian Industrials Ltd. v. *Mindi Rama*, (1928) 27 M.L.J. 501: 26 I.C. 822; *Parker* v. *Winlow*, (1857) 7 E.Bl. 1 942: 27 L.J.Q.B. 105: 119 E.R. 1497; *Soopromoniam Chetti* v. *Heilgers*, (1879) I.L.R. 5 Cal. 71; *Venkata Subbiah Chetty* v. *Govindarajulu Naidu*, (1907) I.L.R. 31 Mad. 45: 18 M.L.J. 1.; *Bateman* v. *Phillips*, (1812) 15 East 272 S.C.: 104 E.R. 847; *Shankar Bandu* v. *Shankar Babaji*, A.I.R. 1956 Bom. 165.

T. Chengalvaroyan and *M. Thirugnanasundaram*, for Plaintiff in (C.S. No. 48 of 1967).

P.V. Subramaniam, for Defendants in (C.S. No. 48 of 1967).

P.V. Subramaniam, for Plaintiff in (C. S. No. 33 of 1968).

T. Chengalvaroyan, for Defendant in (C.S. No. 33 of 1968).

*C.S. Nos. 48 of 1967 and 33 of 1968. *20th January*, 1972.

The Court delivered the following

JUDGMENT:—These two suits arise out of a contract between the Corporation of Madras, who is the plaintiff in C. S. No. 48 of 1967 and a partnership firm by name Fomra Brothers, who is the defendant in that suit, for the supply of certain types of high tension power cables by the firm to the Corporation. C. S. No. 48 of 1967 has been filed by the Corporation of Madras for the recovery of a sum of Rs. 1,40,625 with subsequent interest towards damages on the ground that the defendant committed breach of contract in its failure to supply the power cables contracted for and that the Corporation was forced to make purchases from open market in which they had to pay more than the price settled between the parties in respect of the same type of cables. The other suit namely, C. S. No. 33 of 1968 is one filed by the above said partnership firm, namely, Fomra Brothers against the Corporation of Madras for the recovery of a sum of Rs. 16,432.98 with interest of Rs. 1,297.02 totalling Rs. 17,730 towards the value of cables already supplied by the firm to the Corporation. It is common case that out of the contracted quantity of power cables only a small portion was supplied by the firm to the Corporation and the value of those supplies came to Rs. 16,432.98. This amount had been withheld by the Corporation, though it was due to the firm, on the ground that the same was liable to be set off towards the damages suffered by the Corporation owing to the firm's failure to supply the major part of the contracted quantity of power cables.

Hereinafter in this judgment the Corporation of Madras would be referred to as the plaintiff and the partnership firm namely, Fomra Brothers would be referred to as the defendant.

2. The plaintiff invited tenders for the supply of power cables of the specified type and the defendant filed a tender. It was duly accepted by the plaintiff by its communication dated 4th November, 1963. Later, a formal contract was executed between the parties and that is dated 6th June, 1964. It is common ground that the defendant supplied only 7,220 metres of a particular type of power cable and failed to supply the balance. There had been correspondence between the parties and the defendant had been asking for time on the ground that its principals namely, a company called Power Cables which is a manufacturing company at Bombay, had not made the supplies. By a letter dated 6th January, 1965, the plaintiff notified that if the defendant failed to supply the quantity within seven days from the date of receipt of that letter, the contract would be terminated and purchase at the risk of the defendant as per clause 4 of the terms of the contract would be made, and that the penal provisions of the contract would be enforced. The defendant by their letter dated 11th January, 1965 requested further extension of time, but the plaintiff refused further extension. It is, therefore, the case of the plaintiff that the defendant committed breach of the contract. Then the plaintiff purchased the power cables of the type required in the open market from various concerns such as Messrs. Galada Enterprise, M/s. S. G. Electricals and M/s. Crompton Engineering Company (P) Limited. The total price paid by the plaintiff for these purchases in the open market was Rs. 4,52,544 as per the case of the plaintiff. It is its further case that the cost of the cables at the contract rate came to only Rs. 3,11,919. Therefore, the plaintiff says that it had suffered damages to the extent of Rs. 1,40,625.

3. The defendant in its written statement has refuted the claim of the plaintiff and mainly contended that the defendant was not liable to be sued by the plaintiff because it acted only as the agent of the manufacturing company, namely, the Power Cables (P) Limited, Bombay who were termed and disclosed to the plaintiff as principals of the defendant in respect of the tender made by the defendant. It is pointed out that in the tender itself it was specifically stated that orders for the goods must be placed by the plaintiff with the said company and that payments were to be made by the plaintiff direct to that company. It is its further case that the period of delivery mentioned in the contract was only tentative and subject to *force majeure* conditions including

shortage of raw materials, breakdown in machinery, labour strikes and also availability of electrical energy. It is further stated that as per the terms of the tender the defendant was liable to supply the goods only after the said goods were supplied by the Power Cables Private Limited, and if due to any reason whatsoever the Power Cables Private Limited, failed, to supply the said goods to the defendant, the defendant was not liable to supply the same to the plaintiff. In the view that I am taking regarding the question whether suit by the plaintiff is maintainable against the defendant it having acted as the agent of disclosed principal namely, Power Cables Private Limited, I think it is not necessary to elaborate the other defences taken by the defendant. Suffice it to mention the issues set for trial. They are:

1. What are the terms and conditions of the contract entered into between the plaintiff and the defendant for the sale and purchase of cables?

2. Is the defendant not liable to the plaintiff for all or any of the reasons relied upon in para. 4 of the written statement?

3. Is the defendant guilty of breach of contract?

4. What is the correct date of breach if any, committed by the defendant, and what is the proper or correct measure of damages?

5. Is the defendant absolved from the liability to deliver the goods to the plaintiff on the ground that the defendant's principals had not supplied the cable to the defendant?

6. What is the precise scope and effect of the provisions relating to purchase? Is it illegal and invalid? Will the clause for repurchase entitle the plaintiff to claim damages except in accordance with law, *i.e.*, the difference between the contract rate and the market rate on the date of the breach?

7. To what reliefs are the parties entitled?

4. The other suit, namely, C. S. No. 33 of 1968 was originally filed by the defendant against the plaintiff (Corporation of Madras) in the City Civil Court, Madras as O. S. No. 4476 of 1966. It was later transferred to this Court to be tried along with C. S. No. 48 of 1967. As already noted that suit is for the recovery of a total sum of Rs. 17,730 towards the cost of the cables already supplied by the defendant to the plaintiff with interest. As far as this suit is concerned the plaintiff (who is the defendant in that suit) has practically no defence except saying that it had every right to withhold the amounts until it is reimbursed by the defendant for the loss incurred by the plaintiff in respect of breach of contract committed by the defendant. The only material issue framed in that suit by the Judge of the City Civil Court, when the suit was pending there is, whether the Corporation of Madras is liable to refund the suit amount. It is not a question of refund and the issue should properly read as whether the Corporation of Madras is entitled to set off the suit amount against the claim for damages. The evidence was recorded in C. S. No. 48 of 1967 and treated as evidence in the other suit as well. Apart from exhibiting a number of documents, two witnesses, namely the Upper Division Clerk dealing with the subject and the Electrical Engineer concerned, were examined by the plaintiff and two witnesses were examined by the defendant.

5. The main question is, whether as per the provisions of section 230 of the Contract Act, the suit for the claim of damages is not maintainable against the defendant.

6. From the evidence on record it appears to me to be indisputable that the defendant entered into the contract with the plaintiff only in its capacity as the agent of the company, namely, the Power Cables Private Limited and not in its individual capacity. Exhibit P-1 dated 24th September, 1963 is the tender made by the defendant. It is mentioned in this tender that the defendant was the distributor for the 'Insulast' brand armoured power cables manufactured by Messrs. Power Cables Private Limited, for Madras State, and as such the defendant was quoting for

the products of that company on behalf of that company, namely, Messrs. Power Cables Private Limited, Bombay. It is further mentioned that in the event of the plaintiff accepting the tender and making an order, it may please note that the same must be placed on the above said company directly and payment was to be made to them direct. It is further stated that the consignment would be despatched by the defendant's principals (namely the company) to Madras and the defendant being their distributor shall clear the same and deliver them at the plaintiff's stores, on behalf of the company. Under the heading 'delivery' in this tender in respect of item No. 1 the defendant says that the delivery was to start after eight weeks time after receipt of the plaintiff's firm order by the defendant's principals, and that delivery would be effected at the rate of seven K. Ms. per month. In respect of item No. 2 also, there is similar reference to the order being received by the defendant's principals for effecting delivery. Exhibit P-5 dated 4th November, 1963 is the letter from the plaintiff to the defendant accepting the latter's tender. Here the plaintiff itself refers to the Power Cables Private Limited, as the principals of the defendant. Regarding the period of delivery this acceptance letter says that it was to start after eight weeks' time after the receipt of the order (from the plaintiff) by the principals (Power Cables Private Limited), and delivery to be effected at the rate of seven K. Ms. per month. With regard to the second item also, there is similar reference. This is in accord with the terms of the tender regarding delivery. Exhibit P-12 is the formal printed agreement dated 6th June, 1964 entered into between the parties. This agreement has been signed by the defendant without stating that it was so signing as the agent of Power Cables Private Limited. As a matter of fact there is no reference to the principals in this printed contract.

7. If the tender and the letter of acceptance are to be looked into for the purpose of ascertaining whether the defendant entered into this contract on its own behalf or as agent of the Power Cables Private Limited, there can be no difficulty whatsoever in coming to the conclusion that it acted only as the agent of the company and not otherwise. However, the learned Counsel for the plaintiff contends that whatever be the terms mentioned in the tender and the acceptance letter they should be ignored because the formal contract which was executed by the parties at a later date should be deemed to have superseded the other documents. He further contended that if the terms of the contract as found in the tender and the acceptance letter are inconsistent with the terms contained in the formal contract, the latter should prevail. However, I am not impressed with this part of the argument of the learned Counsel for the plaintiff. There can be no doubt that the contract between the plaintiff and the defendant came to be concluded when the plaintiff wrote the letter of acceptance. An offer had been made in the tender and once the offer is accepted by the other party, a contract is undoubtedly concluded. This position is not in dispute. The learned Counsel for the plaintiff also concedes that the tender and the acceptance letter are also part of the contract. Therefore, it is not correct to say that the printed form contract should be deemed to have superseded the other documents, namely, the tender and the acceptance letter.

8. The contention of the learned Counsel for the plaintiff is that because in the formal contract there is no reference to the Power Cables Private Limited, and the defendant has signed the contract not as the agent of its principals, the defendant cannot be heard to say that section 230 of the Contract Act is a bar to the maintainability of the suit. Under that section, in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he bound by them. Under certain circumstances a contract to the contrary shall be presumed to exist, and one such circumstance is non-disclosure of the principal. In the present case, there is no question of the principal having not been disclosed. As is already seen in the tender the defendant had made it clear that it was making the tender only on behalf of the Power Cables Private Limited.

Therefore, we have to only find whether the contract had been entered into by the defendant on behalf of the principal. As mentioned earlier the contention on behalf of the plaintiff is that because in the formal contract there is no reference to the principal and the defendant signed the contract only in its individual name and not as the agent of the Power Cables Private Limited; it must be held that the contract was entered into by the defendant only on its own behalf and not as the agent of the company. In this connection the learned Counsel relied on a Bench decision reported in *The South Indian Industrials Limited* v. *Mindi Rama Jogi*[1]. In that case the defendants were Dubashes under one Arbuthnot and Company. As Dubashes they stood guarantee for the due performance of the contract entered into by Arbuthnot and Company, through the defendants. Arbuthnot and Company had transferred its business to the plaintiffs in that suit, namely, the South Indian Industrials Limited. However Arbuthnot and Company were the managing agents of the abovesaid South Indian Industrials Limited. Even after the abovesaid transfer of business to the South Indian Industrials, Arbuthnot and Company had been entering into contracts with the defendants not as managing agents of the South Indian Industrials Limited, but only on their own behalf. On the ground that the defendants had committed breach of contract the South Indian Industrials Limited who were not parties to the contract filed the suit against the defendants. It was held in that suit that the plaintiffs had no privity of contract with the defendants and that the suit was not maintainable. But this decision would not help the plaintiff in the present suit. There, the finding was that the defendants in that suit were sub-agents of Arbuthnot and Company, that the said company and the defendants were contracting as independent parties and that, therefore, the plaintiffs could not sue the defendants. It was alternatively found that even otherwise, there was a special agreement between the parties disentitling the plaintiffs from suing upon the contract. The learned Counsel for the plaintiffs relied upon certain observations in that judgment in support of his contention that, even though the principal might have been disclosed, the personal liability of the agent should be upheld on the ground that he did not sign as agent. It is true, in this case, that the formal contract had not been signed by the defendants as the agent of the company, namely, the Power Cables Limited. But as already pointed out, the formal printed form contract is not the only document constituting the contract. The tender submitted by the defendant and the acceptance by the plaintiff really concluded the contract and those documents are certainly part and parcel of the contract. There is no warrant for the contention that the printed form contract had superseded the earlier documents. Further, as pointed out by Seshagiri Aiyar, J. as a member of the Division Bench which decided that case in *The South Indian Industrials Ltd.* v. *Mindi Rama Jogi*[1], the position that, though the principal was disclosed, the personal liability of the agent should be upheld on the ground that he did not sign as agent, is an extreme position. That principle is adumbrated in *Parker* v. *Winlow*[2], Seshagiri Aiyar, J., referring to the abovesaid case remarks that it is an extreme case.

9. In any event, the fact that the agent did not sign as the agent of his principal but only signed simpliciter would not conclude the matter. All that has been held in the above quoted division bench decision of this Court is that, there is a strong presumption in such an event that the contract was entered into by the agent in his individual capacity (Vide the observations at the end of page 512 in *The South Indian Industrials Ltd.* v. *Mindi Rama Jogi*[1]. I have already pointed out that, even though the defendant had not signed the formal contract as the agent of the Power Cables Ltd. it has been made amply clear in the tender itself that the defendant was making the tender only on behalf of the said company.

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1. (1928) 27 M.L.J. 501: 26 I.C. 822.

1. (1928) 27 M.L.J. 501: 26 I.C. 822.
2. (1857) 7 Bl. 942 : 27 L.J.Q.B. 105 : 119 E.R. 1497.

10. One part of the arguments of the learned Counsel for the plaintiff is that, once the contract has been signed by the agent in his individual capacity, no evidence *aliunde* is admissible to show that the agent had acted, in entering into the contract, for and on behalf of his principal. In *The South Indian Industrials Ltd.* v. *Mindi Rama Jogi*[1], evidence had been let in that the defendants in that case knew fully well that Arbuthnot and Company, were the agents of the South Indian Industrials Ltd. (Plaintiffs in that case) and that Arbuthnot and Co. had acted only on behalf of the South Indian Industrials Ltd. in entering into contracts with the defendants. The contention before the Bench was that such parol evidence was inadmissible under section 92 of the Evidence Act. Though the then officiating Chief Justice, who was one of the members of the Division Bench, was inclined to accept such a contention, Seshagiri Aiyar, J., has made the following observations :

> "My. Srinivasa Aiyangar objects to the admission of this parol evidence. He relies upon section 92 of the Evidence Act and quotes an *obiter dictum* of Wilson, J. in *Soopromoniam Chetti* v. *Heilgers*[2], in support of his position. As pointed out in *Venkata Subbiah Chetty* v. *Govindarajulu Naidu*[3], the question whether one of the contracting parties was acting for himself or on behalf of a principal does not relate to the terms of the contract. *Bateman* v. *Phillips*[4], is a direct authority in favour of the admissibility of parol evidence under such circumstances. See also Bowstead on Agency, Article 90 and the cases quoted under it".

11. The learned Counsel for the plaintiff also referred to the decision in *Venkatasubbiah Chetty* v. *Govindarajulu Naidu*[3] that is also a Bench decision. But, as a matter of fact, that decision is against the contention of the learned Counsel for the plaintiff. There it was observed (at page 47) that a question as to who the contracting parties are is not one of the "terms of a contract" within the meaning of sections 91 and 92 of the Indian Evidence Act. It was held that oral evidence is admissible to show that the party made liable under the contract contracted for himself and as the agent of his partners. Even if it is to be held in this case that the formal printed form contract is the only document evidencing the contract and that the defendant was trying to lead evidence *aliunde* to show that he did not contract on his own behalf, but only on behalf of the Power Cables Private Ltd., such evidence cannot be shut out as infringing the section 92 of the Evidence Act, in view of the decision of the Division Bench referred to above. The learned Counsel then referred to the decision in *Shankar Bandu* v. *Shankar Babaji*[1]. There, of course, it has been observed that a contract deals with the subject-matter as well as the persons between whom it is entered into, and the names of the parties in so far as they relate to the terms which create obligations, cannot be regarded as so divorced from the terms of the contracts and that evidence may not be led to show that some other persons intended to incur obligations under the contract instead of the parties designated therein. *Venkatasubbiah Chetty* v. *Govindarajulu Naidu*[2], has been referred to in this decision. But the learned Judge of the Bombay High Court had quoted only the head note thereof. As already seen in the Madras case the Division Bench has already held that a question as to who the contracting parties are is not one of the "terms of the contract" within the meaning of sections 91 and 92 of the Evidence Act. I think it is unnecessary to pursue this aspect further because this is not a case where the defendant is trying to lead parol evidence or any other evidence *aliunde* to show that it acted only as the agent of the Power Cables Private Ltd. In fact, the defendant relies upon the terms of the contract themselves to prove its case. It is needless to stress that the tender as well as the acceptance of the tender, formed part of the contract and in those documents it has been made abundantly clear that the defendant was acting only on behalf of the Power Cables Private Ltd. Therefore, this is not a case where the defendant is trying to

1. (1928) 27 M.L.J. 501 : 26 I.C. 822.
2. (1879) I.L.R. 5 Cal. 71.
3. (1907) I.L.R. 31 Mad. 45 : 18 M.L.J. 1.
4. (1812) 15 East 272 S.C. : 104 E.R. 847.

1. A.I.R. 1956 Bom. 165.
2. (1907) I.L.R. 31 Mad. 45 : 18 M.L.J. 1.

lead extraneous evidence in support of its case that it acted only as an agent of its principal. Under all these circumstances I am clearly of the view that the defendant, having acted only as the agent of its principal, namely, the Power Cables Private Ltd. and there being no contract to the contrary, the contract cannot be personally enforced against it. On this ground the plaintiff has to be non-suited. Therefore, I consider it not necessary to go into the other questions arising in this case.

12. Coming to the other suit, namely the one filed by the defendant for the recovery of the value of the goods already supplied, it was noted earlier that plaintiff (the defendant in that suit) had practically not raised any defence except saying that it was entitled to withhold the payment and set off the amount towards the damages it has suffered in respect of the breach of the contract committed by the defendant. Because of its stand that the contract was entered into by the defendant only in its individual capacity, there is no defence in the suit filed by the defendant that the same is not maintainable by the defendant as per the provisions of section 230 of the Contract Act. Even so, on my finding recorded earlier, namely, that the defendant did not act on its own behalf in entering into the contract, but acted only on behalf of its principals namely, the Power Cables Private Ltd. the suit filed by the defendant has also necessarily to be dismissed, for, under section 230 of the Act, the agent is not only not personally bound by the contract, but also cannot personally enforce the Contract.

13. In the result, both the suits are dismissed. In the circumstances of the case, I direct the parties to bear their respective costs.

P.S.P. ——— *Suits dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*K. Veeraswami, C.J.* and *V. V. Raghavan, J.*

S. C. V. Gopal, Chief Promoter, Tamil Nadu Road Transport Financing Co-operative Society Limited, Madras .. *Petitioner**

v.

The Joint Registrar of Co-operative Societies, Madras and others .. *Respondents.*

Tamil Nadu Co-operative Societies (Amendment) Act (XIX of 1953), *section* 27 (1) — *Provisos—Co-operative Society — Nomination to committee of management—Non-member —Whether can be nominated by the Joint Registrar—Constitution of India* (1950), *Article* 226.

The Joint Registrar of Co-operative Societies acting in exercise of his power under the second proviso to section 27 (1) of the Tamil Nadu Co-operative Societies Act, 1953, read with the relevant bye-law of a Co-operative Society nominated some non-members to its committee of management. The petitioner challenged the validity of such nomination.

Held, on a reading of the provisos of section 27 (1) and the bye-laws (of the Co-operative Society) in a harmonious way, it was not the intention of the provisos that the power of nomination should be limited only to members. As a matter of fact, the provisos did not contain any words of limitation. [*Para.* 10.]

Case referred to :—

Sami Rao v. *The Registrar of Co-operative Societies,* W. P. No. 113 of 1966.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the proceedings of the

* W.P. No. 805 of 1970. 15*th February,* 1973.

Joint Registrar of Co-operative Societies, Madras, dated 14th March, 1970 and made in his R. C. No. 33074/68-B-3 and quash the proceedings with costs.

K. V. Sankaran and *K. Ranganathan*, for Petitioner.

D. Raju for the Government Pleader, for Respondents.

The Order of the Court was made by

Palaniswami, J.—This petition is filed by Gopal, Chief Promoter of Tamil Nadu Road Transport Financing Co-operative Society, Limited, Madras to quash the order of the Joint Registrar of Co-operative Societies, Madras, the first respondent herein, dated 14th March, 1970, under which the first respondent nominated eight persons as members of the committee of management of the petitioner society. Gopal and nine others promoted the petitioner society for the purpose of providing cheap and convenient credit facilities to small lorry owners for purchase of vehicles. About 150 members were enrolled. The promoters proposed to the Deputy Registrar of Co-operative Societies a panel of names of shareholders for the committee of management. The Joint Registrar of Co-operative Societies purported to nominate eight persons as members of the committee of management by virtue of the powers conferred on him under Transitory Bye-law No. 20 of the Bye-laws of the petitioner society. It is to quash this proceeding that this writ petition has been filed.

2. The ground, upon which the proceeding is sought to be quashed, is that under the provisions of the Madras Co-operative Societies Act, 1951 (hereinafter referred to as the Act), the Joint Registrar, purporting to act on behalf of the Government, has no jurisdiction to nominate any person to be a member of the committee if that person is not already a member of the society. Out of the eight persons nominated by the Joint Registrar, one is the Deputy Registrar of Co-operative Societies, who is ex-officio member and for whose nomination there is no objection. Out of the remaining 7, two alone are members of the society and the rest 5 are non-members. The petitioner takes objection to the nomination of these five non-members.

3. The relevant provision of the Act that confers powers upon the Government to make nomination is contained in section 27 of the Act. Sub-section (1) of that section reads thus :

27 *Appointment of committees* :—

(1) The general body of a registered society shall constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the registered society to such committee. Provided that, in the case of a society registered after the commencement of this Act, the persons who have signed the application to register the society may appoint a committee to conduct the affairs of the society for a period of three months from the date of registration or for such further period as the Registrar may consider necessary ; but the committee appointed under this proviso shall cease to function as soon as a committee has been constituted in accordance with the by-laws:

Provided further that where the bye-laws so provide, the Government or the Registrar may nominate all or any of the members of the committee for such period as may be specified in the bye-laws.

Bye-law 20 of the Bye-laws framed by the petitioner society deals with constitution of the committee. Sub-clause (1) of that by-law *inter alia* states that the executive management of the affairs of the society shall vest in a committee consisting of not more than 9 members of whom an official of the Co-operative Department and an officer not below the rank of the R.T.O. in the office of the Commissioner of Transport, Madras, shall be the ex-officio members of the committee and that the remaining 7 shall be elected. Transitory Bye-law No. 20, under which the Joint Registrar, first respondent, has purported to make the impugned nomination of nine persons, reads:

"Notwithstanding anything contained in these bye-laws, the first set of the members of the committee including the President and Vice-President may be nominated by the Registrar for a period of 3 years, which if found neces-

sary may be extended to a further period of 3 years at the discretion of the Registrar. Such nomination may at the discretion of the Registrar, be made for a period of one year or such shorter period as may be found necessary at a time".

From the language adopted in the aforesaid transitory bye-law, it would appear that in all cases of first set of members of a committee it is the Registrar who should nominate the members of the committee including the President and the Vice-President. It is contended for the petitioner that in exercising this power under Transitory By-law No. 20, the Registrar cannot nominate any one who is not a member of the society and that inasmuch as the Joint Registrar, in the instant case, has nominated five outsiders as members of the committee, the order is vitiated. On behalf of the first respondent it is submitted that it is not obligatory on the Registrar to nominate only members to the first committee, that it is not provided either in the Act or in the bye-laws that only members of the society could be nominated and that in the absence of such a provision, it is open to the Registrar to appoint anybody he likes if such persons, in his opinion, are interested in the business of the society.

4. Section 28 of the Act deals with disqualifications for members of committee. This section consists of six sub-sections. Sub-section (1) deals with the disqualification of persons to be elected or appointed as a member of the committee. Sub-section (2) enumerates the cases in which a member of a committee shall cease to hold his office if he incurs any one of the disqualifications detailed therein. Sub-section (3) enumerates further disqualifications. These disqualifications, broadly speaking, refer to members being members of more than a specified number of societies. The object underlying this sub-section is to prevent persons monopolising all offices in co-operatives and to prevent the tendency on the part of the co-operators to become professional co-operators. But these disqualifications mentioned in sub-section (3) are not applicable to a member nominated to the committee by the Government or the Registrar. This exception is provided in clause (*e*) of sub-section (3). It is unnecessary to refer to the purport of the other sub-sections as they are not relevant for consideration in this case.

5. It would thus be seen that sub-section (1) of section 28 deals with election and appointment of a member of the committee. But sub-section (2) is worded in general terms and merely refers to a member of the committee without specifying whether such a member is an elected member or an appointed member or a nominated member. Sub-section (3), by reason of clause (*e*) of that section, would apply only to cases of members elected or appointed. It would thus be seen that the Legislature in enacting section 28 has maintained the distinction between election, appointment and nomination. But so far as the supervening disqualifications enumerated in sub-section (2) are concerned, the Legislature has referred to the members as members generally without indicating whether such members are nominated members, or elected members or appointed members. It is, therefore, contended on behalf of the petitioner, that, when the Government or Registrar nominates the members of the first committee by virtue of the power conferred under the second proviso to sub-section (1), of section 27 they can nominate only a member of the society. One of the supervening disqualifications on account of which a member shall cease to hold his office is his cessation of membership of the society. That means, if, at the time of his becoming a member of the committee, whether by election, appointment or nomination, he was a member of the society, and if thereafter he ceases to be a member of the society, he shall cease to hold his office as a member of the committee. By reason of this provision it is contended for the petitioner that if, at the time of nomination by the Registrar, the person concerned is not a member of the registered society, he cannot, by necessary implication, be nominated as a member of the committee.

6. I think the foregoing contention is well-founded. Section 2 (2) defines "committee" as meaning the governing body of a registered society to whom the management of its affairs is entrusted. According to sub-section (6) of section 2, "member" means a person, joining in the application for the registration of a

society and a person admitted to membership after registration in accordance with the Act, the rules and the bye-laws and includes a nominal and an associate member. Inasmuch as the function of the Committee is to manage the affairs of the society, it is reasonable to infer that when a person is to be nominated by the Government or Registrar as a member of the committee, he should be one interested in the affairs of the society. The interest of the person concerned can be best judged by ascertaining whether he is a member or not a member. If he is not a member, it cannot normally be expected that he would be interested in the affairs of the society, and cannot be said to be a competent person to whom, along with others, the management of the affairs could be entrusted. The second proviso to section 27 no doubt does not say that the person to be nominated by the Government or the Registrar should be a member of the society. But having regard to the scheme of the Act and the provisions contained in sub-section (2) of section 28 dealing with the supervening disqualifications, it is reasonable to infer that in making the nomination by virtue of the power under the second proviso to sub-section (1) of section 27, the Government or the Registrar cannot nominate any one who is not a member of the society.

7. To hold, that the Government or the Registrar can nominate even non-members would lead to anomalous results. If the person nominated does not choose to become a member after nomination, he would continue to be a non-member. To allow him to continue to be a non-member would result in flagrant violation of sub-section (2) of section 28 which *inter alia* states that a member of the committee shall cease to hold his office if he ceases to be a member of the registered society. To hold that even non-members can serve on the committee if they are nominated by the Government or the Registrar would go against the very spirit of the Act.

8. My attention was drawn to the decision of Kailasam, J., in *Sami Rao* v. *The Registrar of Co-operative Societies*[1], in which the learned Judge has taken a different view. That decision does not appear to have been reported so far. In that case, the contention appears to have been urged that the word "appointed" would include the word "nominated". The learned Judge rejected that contention and took the view that the requirement that an elected or an appointed member should be a member of the society cannot be applicable to the case of a nominated member. With respect, I am unable to agree with this conclusion. The learned Judge has further observed that sub-sections (1) and (2) of section 28 which deals with disqualifications are not applicable to nominated members. On this aspect also I am, with respect, unable to agree. Whereas sub-section (1) of section 28 explicitly refers to a member being either an elected member or an appointed member, sub-section (2) does not make any such distinction. Sub-section (2) is worded in a general way so as to comprehend within it elected, appointed and nominated members. If the intention of the Legislature was that sub-section (2) should be applied only to an elected or an appointed member, there would have been no difficulty in using appropriate language. As I have already pointed out, sub-sections (1) and (3) deal with disqualifications of members elected or appointed, whereas sub-section (2) is general in its terms. Inasmuch as my view is in conflict with the view of Kailasam, J., in the case referred to above, I think it is better that the matter is decided by a Bench, as this question is likely to be of importance in the administration of co-operatives. I would, therefore, place the papers before my Lord the Chief Justice for referring the case to a Bench for decision on the question whether in exercise of the powers under the second proviso to sub-section (1) of section 27, the Government or the Registrar can nominate any person as a member of the committee even if he is not a member of the society.

K. V. Shankaran and K. Ranganathan, for Petitioner.

The Government Pleader for Respondents 1 and 2.

G. Venkatesan and N. Rajasekaran, for 3rd Respondent.

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1. W.P. No. 113 of 1966.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The petition comes before us because Palaniswamy, J., found that he could not agree with Kailasam, J., in *Sami Rao* v. *The Registrar of Co-operative Societies*[1], on the effect of the second proviso to section 27 (1) of the Tamil Nadu Co-operative Societies Act, 1953, read with the relative bye-laws. The petitioner claims to be the promoter of Tamil Nadu Road Transport Financing Co-operative Society Ltd., Madras. He seeks to quash the order of the Joint Registrar of Co-operative Societies, dated 14th March, 1970 by which he nominated eight persons as members of a committee of management for the society. The society was promoted by the petitioner and nine others. Out of the eight persons, five are non-members, of whom one is the Deputy Registrar, for whose inclusion there is no objection. The Joint Registrar in nominating the members of the committee acted in exercise of his power under the second proviso to section 27 (1) of the Act read with bye-law 20 of the bye-laws of the society. Section 27 (1) relates to the appointment of committees. The general body of a registered society shall constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the registered society to such committee. By the first proviso power is given to those persons who have signed the application to register the society to appoint a committee to conduct the affairs for a period of three months from the date of registration of the society, or for such further period as the Registrar may consider necessary. The committee so appointed shall however cease to function as soon as a committee has been constituted in accordance with the bye-laws. Then comes the second proviso which has provided further that where the bye-laws so provide, the Government or the Registrar may nominate all or any of the members of the committee for such period as may be specified in the by-laws. Bye-law 20, relates to the constitution of the committee and this bye-law contains the transitory bye-law which is:

> "Notwithstanding any (*sic*) contained in these by-laws, the first set of the members of the Committee including the President and Vice-President may be nominated by the Registrar for a period of 3 years, which if found necessary may be extended to a further period of three years at the discretion of the Registrar. Such nomination may at the discretion of the Registrar, be made for a period of one year or such shorter period as may be found necessary at a time".

The contention of the petitioner is that the said proviso as also the transitory bye-law read with the general tenor and scheme of the entire Act would indicate that nomination to the committee of non-members is not contemplated. It was on this question Palaniswami, J., and Kailasam. J., have differed.

10. A registered society is defined to mean a society registered or deemed to be registered under the Act. Section 4 (1) indicates that a society may be registered with the co-operative principles kept in view and it contemplates members forming the society. A committee is defined to mean the governing body of a registered society to whom the management of its affairs is entrusted and a member means a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the Act, the rules and the bye-laws and the expression includes a nominal and an associate member. The bye-laws of the society too contemplate election of the members of the committee. Section 28 (1) speaks of disqualifications for membership of committee. The first proviso to section 27 (1) relates to appointment and the second proviso provides for nomination. On a reading of these provisos and the the bye-law in a harmonious way, we are inclined to think that it is not the intention of the provisos that the power of nomination should be limited only to members. As a matter of fact, the proviso does not contain any words of limitation. Equally the transitory bye-law framed under bye-law 20, which we have set out above, is also not indicative that only members can be appointed to the committee.

1. W.P. No. 113 of 1966.

11. It is vehemently contended for the petitioner that he being one of the signatories to the application for registration of the society, he would never have asked for forming the society if he had known that the transitory committee would be manned by non-members. This argument does not take us anywhere. What matters is not the intention of the petitioner, or what he would have done in certain circumstances. We are here concerned with the language of the second proviso to section 27 (1). The committee being purely of a transitory character and, therefore, could be formed at the initial stage of the formation of a society. It may be that in a given case, there may not be enough number of members out of whom a committee could be formed. It may be for this reason, the second proviso to section 27 (1) and also the transtory bye-law aforesaid, do not specifically direct that the nomination to the transitory committee could only be from members of the society..

12. But this petition has been pending in this Court since 1970. A transitory committee is not expected to survive that long. As a result of stay granted by this Court, we are told that the committee never came into existence, or if it came into existence, it never operated. That being so, we think it would suffice if we direct that the committee nominated by the Registrar will not be allowed to function, but instead a committee will be brought into existence in accordance with the by-laws and the provisions of the Tamil Nadu Co-operative Societies Act. In bringing into existence a fresh committee of management, due notice should necessarily have to be taken of the fact that even at the time of the registration of the society, there were as many as 150 members, or even more, and the fact that the society is expected to function on the principles of co-operation, which include representation. Subject to these observations, the petition is dismissed. No costs.

S.J. ——— *Petition dismissed subject to observations.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT.—*T. Ramaprasada Rao, J.*

Devi & Co., Rayavaram, represented by Partner A.C.RM. Arunachalam Chettiar .. *Petitioner**

v.

The Regional Provident Fund Commissioner, Tamil Nadu and Pondicherry at Madras and another .. *Respondents.*

Employees Provident Funds Act (XIX of 1952)—Whether employees in business were less than 20—Statement recorded by Inspector—Demand made for contribution—Proceedings under Revenue Recovery Act—Employer disputing correctness of the assessment of number—Conflicting material—Could not be gone into by Court in exercise of jurisdiction under Article 226 of the Constitution—Proper remedy open to employer—Need for opportunity to be given to employer for fixing quantum of liability.

Where a partnership had inducted into its business seasonal casual labour by reason of which the number of persons in the employment increased beyond 20, and a statement recorded by an inspector of the concerned department on a casual inspection of ledgers showed the number as 22 without investigating whether they were employed in the trade regularly, while the attendance registers kept in the regular course of business showed the number to be less than 20, and the statement recorded had been countersigned by one of the partners, it was held that the mere numerical strength without a further probe into the labour force of the establishment to ascertain whether the employees therein were annexed to the trade and business will not clinch the matter. Where there is a controversy in the matter of the number of persons employed in a trade for purposes of the Employees' Provident Funds Act, such questions could not be gone into in a summary fashion in the High Court in exercise of its jurisdiction under Article 226 of the Constitution.

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* W.P. No. 2455 of 1971. *3rd July, 1973.*

Section 19-A (*iii*) of the Employees' Provident Funds Act envisages that an aggrieved person should approach the Central Government for a due enquiry as to whether a particular establishment was employing more than 20 persons so that it could be deemed to be coming within the framework of the Act. [*Para.* 1.]

In view of the petitioners not having been given an opportunity to have the quantum of demand under the Act corrected, the department must give them a fresh opportunity for fixing the quantum of liabilities and thereafter take action under the Revenue Recovery Act. [*Para.* 3.]

Cases Referred to

The Provident Fund Inspector, Guntur v. *T. S. Hariharan*, A.I.R. 1971 S.C. 1519; *East Omdon Gudistroes (Madras)* v. *Regional Provident Fund Commissioner*, (1964) 1 M.L.J 441 : I.L.R. (1964) 1 Mad. 813 : A.I.R. 1964 Mad. 371.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to the petitioner firm in C/TH/4849/REGL and quash the order made therein dated 7th July, 1971 as confirmed in the letter dated 16th July, 1971 under the same number.

K. Sarvabhauman, for Petitioner.

S. M. Ali Mohamad, for Respondents.

The Court made the following

ORDER.—Confronted with a demand under the Revenue Recovery Act for the payment of Rs. 3,733-50 said to be payable by the petitioners under the Employees' Provident Funds Act, 1952, the petitioners have come up to this Court for the issue of a writ of *certiorari* to quash the said notice as also the notice dated 16th July, 1971 issued by the Regional Provident Fund Commissioner, Tamil Nadu and Pondicherry States, who independently requested the Collector to recover the arrears urgently under the Revenue Recovery Act. The petitioners' case is that they are stainless steel merchants with head office at Rayavaram in Tiruchirapalli District and with two branches, one at Karaikudi in Ramanathapuram District and the other at Valayapatti in Tiruchirapalli District. According to the petitioners, at no time there were 20 or more employees who were regularly appointed by the petitioners-firm for purposes of their trade. No doubt seasonal casual labour was inducted into the business and by such additional employment given to such labour the number on the rolls has increased beyond 20. But according to the petitioners, ever since the firm was started or at or about the relevant times, the number of persons employed by the petitioners never exceeded 20. On the issue of a rule *nisi*, records were produced. The petitioners produced their attendance registers during the relevant years and the department has produced the file. From the attendance registers kept by the petitioners in the regular course of their business, it is seen that for April, 1967 the number of employees in all the establishments under their control was never more than 20. In juxtaposition to this the file produced by the department discloses a statement made by a partner of the petitioners-firm before an Inspector of the department which shows that there were about 22 employees in the establishments. This statement recorded by the Inspector was counter-signed by one of the partners of the firm. With such conflicting materials before me, arguments were addressed by the learned Counsel for the petitioners that the statement recorded by the Inspector was on a casual inspection and that too with reference to the ledgers maintained by the firm and he did not delve deep into the question whether all the 22 or more employees therein were regularly employed for purposes of trade. It is by now settled that the employment of a person for any purpose whatsoever and for every short duration or for a period of one year is not employment contemplated by section 1 (3) (*a*) and (*b*) of the Employees' Provident Funds Act, for the purpose of determining the number of persons employed in an establishment. The Supreme Court in *The Provident Fund Inspector, Guntur* v. *T. S. Hariharan*[1], did

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1. A.I.R. 1971 S.C. 1519.

not agree with the view of this Court in *East Omdon Gudistores* (*Madras*) v. *Regional Provident Fund Commissioner*[1], and explained the word "employment" as meaning "employment in the regular course of business of an establishment" and that such employment will not include employment of a few persons for a short period on account of some passing necessity or some temporary emergency beyond the control of the establishment. It therefore follows that mere numerical strength without a further probe into the labour force of an establishment to ascertain whether those employed therein are annexed to the trade and business, will not clinch the matter. The learned Counsel for the State would however stress upon the report of the Inspector countersigned by a partner of the firm which disclosed that the number of persons in the establishments was more than 20, whilst the learned Counsel for the petitioners would rely upon the attendance registers which are countersigned by the Labour Inspectors under a different enactment to substantiate their case that at no time the number exceeded 20. There is therefore a controversy in the matter of the number persons employed in the course of business in the petitioners' trade and such questions cannot be gone into in a summary fashion in this Court which exercises jurisdiction under Article 226 of the Constitution.

2. I may incidentally state that at one time there was a proviso to section 1 (5) of the Employees' Provident Funds Act, which enabled firms or employers to get themselves relieved from the clutches of the Act though they were initially liable under it if and when they satisfied the appropriate authority, as provided in the proviso therein that for a continuous period of one year the number of persons employed by them was less than 15. But this proviso has been omitted by Act XVI of 1971. The question, therefore, is as to how a person who is placed in a situation like the one which the proviso to section 1 (5) contemplated could get redress as in the present circumstances. Such persons are not without a relief. Section 19-A though general in sense yet provides for the above situation by giving a right to the aggrieved person to approach the Central Government to decide what the number of persons employed in an establishment at a particular period was less than 20 and therefore the said establishment was beyond the purview of the Act. Section 19-A provides that if any difficulty arises in giving effect to the provisions of this Act and in particular, if any doubt arises as to the number of persons employed in an establishment (S. 19-A (*iii*)) then the Central Government may, by order, make such provision or give such direction not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of the doubt or difficulty. This section, therefore, envisages that an aggrieved person should approach the Central Gorvernment for a due enquiry as to whether a particular establishment is employing more than 20 persons so that it could be deemed to be one coming within the framework of the Act. The petitioners have not availed themselves of this alternative statutory remedy, but have come up to this Court on the issue of a demand under the Revenue Recovery Act, to quash that demand, on the basis that the demand itself has been raised without a legal foundation. Whether there was any basis for the raising of the demand has to be decided on a full enquiry between the parties in an action taken by the Central Government under section 19-A of the Employees' Provident Funds Act. In this view, therefore, I am not inclined to quash the demand as at present.

3. Instead, the petitioners are given the liberty to take appropriate action under section 19-A of the Employees' Provident Funds Act and obtain a decision from the Central Government as to the number of persons employed by them in their establishments. If the decision is in their favour, then the demand automatically becomes unenforceable. But if the decision is against them, then the demand will revive and the petitioners would become liable. Even then it is made clear, in view of the petitioners' objection that they were not given any opportunity to have the quantum of demand corrected, it is expected that the Department will give them a fresh oppor-

1. (1964) 1 M.L.J. 441 : I.L.R. (1964) 1 Mad. 813 : A.I.R. 1964 Mad. 271.

tunity, even if the Central Government, were to decide against the petitioners for fixing the quantum of liability and thereafter take action under the Revenue Recovery Act. Till then the proceedings under the Revenue Recovery Act are not to be enforced.

4. The writ petition is partly allowed and there will be no order as to costs.

P.S.P. *Petition partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*M. M. Ismail, J.*

Hehnamann Homeo Institute, Tiruvarur, Thanjavur District, by Proprietor, Dr. S. Srinivasan .. *Petitioner**

v.

Government of India represented by its Secretary, Ministry of Health, New Delhi and others .. *Respondents.*

Drugs and Cosmetics Rules (1945), *rule* 2 (*dd*)—*Manufacture and sale of homeopathic injections—Homeopathic medicines by parenteral route excluded from definition of homeopathic medicines—Constitutional validity of Rule—Valid classification—Restriction in interest of general public*—Mandamus—*Lies only to enforce legal duty—Constitution of India* (1950), *Articles* 226, 14 *and* 19 (1) (g).

A drug in the form of pills, dilutions, syrups or powders does not stand on the same footing as a drug in the form of injections. The injections are essentially and basically different from the other forms of drugs both with reference to the method and manner of administration and with reference to the reaction and effects they may have from the point of view of time-factor. Consequently, the classifiction between injections on the one hand and pills, dilutions, syrups and powders on the other cannot be said to be invalid or irrational classification offending Article 14 of the Constitution of India. The challenge to the definition contained in clause (*dd*) of rule 2, on the basis of comparison between an injection prepared according to the allopathic system and an injection prepared according to homeopathic system is without substance. There can be a valid distinction and classification between a homeopathic injection and an allopathic injection in the sense that a homeopathic injection is not recognised and well-known in the pharmacopoeia as relevant thereto, while an allopathic injection, does not suffer from the same infirmity. [*Paras.* 6 *and* 7.]

The restriction, if any, with regard to the homeopathic injections in the rules was imposed in the interests of the general public, because homeopathic injections have not been recognised as drugs in the relevant pharmacopoeia. [*Para.* 8.]

It is well established that a writ of *mandamus* will issue only for the purpose of enforcing a legal duty of a public nature imposed upon the respondents which the respondent owe to the petitioner. [*Para.* 9.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the respondents herein to issue a licence to the petitioner for the manufacture and sale of homeopathic injections in his factory at Tirruvarur, Thanjavur District in accordance with rule 85-B of the Drugs and Cosmetics Rules, 1945.

M. S. Sethu, for Petitioner.

V. Suresham and *T. Satyadev*, for Respondents.

The Court made the following

ORDER.—The petitioner in this writ petition is one Hehnamann Homeo Institute, Tiruvarur, Thanjavur District, by proprietor Dr. S. Srinivasan. He has sworn to an affidavit filed in support of the writ petition. In that affidavit he claims that he had obtained a licence to manufacture alloapathic injections and homeopathic injections as well in 1948 itself in

* W.P. No. 4880 of 1968. *3rd April*, 1970.

Licence Nos. 3 and 19 of 1948 in the list of which homeopathic injections were approved by the then Drug Controller of Madras State, that he himself was a qualified chemist under the said Drugs Act, that the licence was being renewed from year to year till 1951 and in the year 1951 when the licence was renewed, the wordings 'Homoeopathic' 'Injections' were removed as it was then found that it was unnecessary under the Drugs Act then, that the licence was being renewed year after year till 1959 : that in the year 1966 he applied for licence for homeopathic medicines and injections to the third respondent herein, namely, Assistant State Drugs Controller, Madras-6, in or about August, 1966 and in his Memo. Ref. No. 59765-D-1/5/66 dated 10th August, 1966, the third respondent directed him to take the approval of the Drugs Controller, New Delhi in the matter; that accordingly by his letter dated 13th February, 1967, the petitioner wrote to the said Drug Controller of India requesting him to grant the permission to the petitioner-Institute, to continue the manufacture of those homoeo injectules as usual and also inform the State Assistant Drugs Controller, Madras, so that he may include homoeo injectules also in the petitioner's licence; that the Drugs Controller of India by his letter dated 14th March, 1967, while requiring the petitioner to furnish the details regarding the composition, methods of test and assay of active ingredients and process of manufacture (including sterilisation) and elimination of pyrogens of injectable preparations, informed the petitioner that homoeopathic medicines as defined in the Drugs and Cosmetics Rules, 1945 as amended in 1964 did not include drugs administered by the parenteral route; that the third respondent herein, on receipt of the said communication from the second respondent herein, by his letter dated 15th July, 1967 informed the petitioner that the manufacture and sale of homoeopathic injectibles without proper licence contravened the provisions of section 18 (*c*) of the Drugs and Cosmetics Act, 1940 and that the petitioner-Institute would render itself liable for prosecution ; and that from that time onwards the petitioner has stopped manufacturing these homoeopathic injectibles. The further case of the petitioner is that it was only on account of an amendment of the rules framed under the Act, called the Drugs and Cosmetics Rules. 1945, in 1964, the respondents had taken this attitude ; that till 1964 there was no separate definition for homoeopathic medicines in the said rules and licences granted for the manufacture of allopathic injectules were held good for the manufacture of homoeopathic injectules also; that by the 1964 amendment, sub-rule (*dd*) in rule 2, was inserted defining homoeopathic medicines in and by which homeopathic medicines (drugs) administered by the parenteral route alone were excluded from the definition of homoeopathic medicines : that by reason of this new amendment the petitioner had been informed by both the Drugs Controller of India and the Assistant State Drugs Controller, Madras (second and third respondents herein) that the petitioner could not get a licence for the manufacture of homoeopathic injectules. It is against the background of these allegations the petitioner contends in this affidavit that sub-clause (*dd*) of rule 2 of the Drugs and Cosmetics Rules, 1945, is violative of Articles 14 and 19 (1) (*g*) of the Constitution of India, in so far as it excludes drugs administered through parenteral route from the definition of homoeopathic medicines. Therefore, the petitioner prays in this writ petition for the issue of a writ of *mandamus* or any other appropriate writ direction or order in the nature of a writ directing the respondents herein, namely: (1) the Government of India, represented by its Secretary, Ministry of Health, New Delhi; (2) The Drugs Controller of India, Directorate General of Health, New Delhi; and (3) The Assistant State Drugs Controller Madras-6, to issue a licence to the petitioner for the manufacture and sale of homoeopathic injections in its factory at Tiruvarur, Thanjavur District, in accordance with Rule 85-B of the Drugs and Cosmetics Rules, 1945.

2. Two separate counter-affidavits have been filed one on behalf of the second respondent and the other on behalf of the third respondent. As far as the second respondent is concerned, he

states in his counter-affidavit that the preparations proposed to be manufactured by the petitioner fall within the definition of the term 'new drug' under the *Explanation* to Rule 30-A (2) of the Rules and therefore the second respondent's Department had asked for details regarding the composition, methods of test and assay of active ingredients and process of manufacture from the petitioner to consider the question of appproving its manufacture as 'new drug' as required under rule 75-B of the Rules. The further case set out in the counter-affidavit of the second respondent is that homoeopathy is based on definite principles and natural laws as laid down in the Organon written by the founder, Dr. Samuel Hahnemann; that no individual has any right or authority to prepare homoeopathic medicines according to his own conception; that all homoeopathic medicines are required to be prepared according to the instructions given by Homeopathic Pharmacopoeia and also used according to the same manner; and that the administration of homeopathic medicines by parenteral route goes against the fundamental tenets of homoeopathy propounded by Hahnemann. The second respondent also states that the data which the petitioner was asked to supply as per his Department's letter dated 14th March, 1967, was to enable the Drugs Controller (India), to consider whether the injectible preparations proposed to be manufactured could be approved as new drug under *Explanation* to Rule 30-A (2) of the Drugs and Cosmetics Rules, 1945. With regard to the specific claim put forward in regard to homeopathic injections, the second respondent states that it is impossible to sterlize any injection of a potentised homoeopathic medicine since heat will affect the efficacy of the product; that sterllisation by methods other than heat, namely, filtration may result in absorption of minute amount of the active drug by the filter and alter the potency of the preparation; and that neither the Homoeopathic Pharmacopoeia nor the Homoeopathic Materia Medica has mentioned so far about the usage of homoeopathic medicines by parenteral route and as such the question of including parenteral method in the definition of homoeopathic medicines does not arise.

3. In the counter-affidavit filed by the third respondent herein, it is further stated that the petitioner never had a licence for the manufacture of homoeopathic injections nor did it manufacture the same. In paragraph 2 of the counter-affidavit, it is stated:

> "It is seen from the old licence books that no licence for the manufacture of drugs has been issued to Hahnemann Homeo Institute, Thiruvarur, but the name of the petitioner, Dr. S. Srinivasan is found as expert staff in the licences in form 25 bearing No. 64 of 1948 dated 15th March, 1948 and in form 28 bearing No. 19 of 1948 dated 26th February, 1948 issued to Biological Laboratories, Thiruvarur, and this firm was permitted to manufacture homeopathic injections also in addition to allopathic medicines. The manufacturing licences in form 25 and 28 bearing No. 31 of 1954 and 3 of 1954 both dated 1st October, 1954 subsequently issued to Biological Laboratories (P.) Ltd., Thiruvarur, were cancelled on 24th December, 1957 itself. Hence, it is submitted that the petitioner's contention in para. 2 of the affidavit that the licences were renewed upto 1966 is not correct."

In paragraph 3 of the counter-affidavit of the third respondent, it is stated:

> "It is submitted that the licences issued to Biological Laboroatories, Thiruvarur, were of course valid upto 1950. While they applied for renewal for the subsequent period the firm themselves had not applied for continuation of permission to manufacture the item 'Homeopathic Injections.' M/s. Biological, Laboratories, Thiruvarur, was converted into a Limited concern in 1954 and the licences granted to them were surrendered by them as per their letter dated 15th November, 1957 since they were not able to comply with Schedule 'M' and were also not able to employ a suitable technical staff as per the Drugs Rules, 1945. Hence the licences were cancelled in the 3rd respondent's P. No. 235/D/57 dated 24th December, 1957."

The further case of the third respondent, as put forward in his counter-affidavit, is that the contention of the petitioner that licence was being renewed from year after year till 1965-66 is not true, as Messrs. Hahnemann Homeo Institute, namely, the petitioner, had never applied for or obtained any licence for the manufacture of drugs and that even the licences that were granted to Messrs. Biological Laboratories (P.) Ltd., Thiruvarur, were surrendered and cancelled as stated in paragraph 3 of the counter-affidavit, and therefore the contention of the petitioner that in the year 1966, it had applied for licence for homeopathic medicines and injections to the third respondent in or about August, 1966 is not correct, as the petitioner had not sent any application for the grant of a licence to the Institute. The counter-affidavit of the third respondent proceeds to state that the case of the petitioner, as set out in paragraph 5 of the affidavit of the petitioner, that the grant of licence had been refused to it for the previous years is wrong and no refusal orders had been issued so far as the application of the petitioner is still under consideration. Added to this, in the course of the arguments, it is also contended on behalf of the respondents before me that the petitioner was required to give the particulars referred to in the counter-affidavit of the second respondent and the petitioner had not so far furnished those particulars.

4. It is against the background of the contentions of the parties put forward in the affidavit and the counter-affidavits, the case of the petitioner for the issue of a writ of *mandamus* directing the respondents herein to issue a licence to the petitioner has to be considered.

5. The petition itself refers to rule 85-B of the Drugs and Cosmetics Rules, 1945. That rule deals with application for licence to manufacture homeopathic medicines. Sub-rule (1) of that Rule states that an application for grant or renewal of licences to manufacture for sale of Homeopathic medicines shall be made to the Licensing Authority appointed by the State Government for the purpose of that part of the Rules and shall be made in Form 24-C. Sub-rule (2) states that the application in Form 24-C shall be accompanied by a fee of rupees forty for manufacture of Homeopathic mother tinctures and potentised preparations and by a fee of rupees twenty for manufacture of Homeopathic potentised preparations only. Sub-rule (3) of this Rule deals with application for renewal of licence and sub-rule 4 deals with the fee that has to be paid for the duplicate copy of the licence. Beyond that rule 85-B does not say anything. As far as the arguments before me are concerned, Mr. M. S. Sethu, learned Counsel for the petitioner, concentrated his attack on the validity of clause (*dd*) of rule 22 of the Drugs and Cosmetics Rules, 1945, as amended by the Government of India, Notification No. F-1/35/64-D, dated 18th August, 1964. This clause (*dd*) defines "Homeopathic medicine" and states :

> "'Homeopathic medicine' includes any drug which is recorded in Homeopathic provings or has known physiological effects as causing the syndromes which it is administered to alleviate if it is used in a dose insufficient to cause active physiological effect, but shall not include a drug which is administered by the parenteral route."

The attack on this definition is only to that part which excludes the drug which is administered by the parenteral route. Mr. M. S. Sethu, learned Counsel for the petitioner, challenges the validity of this Rule on two grounds, namely, that it violates Article 14 of the Constitution of India and secondly it violates Article 19 (1) (*g*) of the Constitution of India.

6. The argument with regard to the violation of Article 14 of the Constitution of India, has been put forward from two points of view. The first is, when the definition includes homeopathic medicines in the form of pills, dilutions, syrups and powders, it excludes injections alone and thereby there is an arbitrary discrimination against injections and therefore Article 14 of the Constitution of India is violated. The second point of view from which this definition was attacked is that while allopathic injections are allowed to be

prepared by grant of a licence under these rules, a licence is not available for preparation of homeopathic injections and therefore Article 14 of the Constitution of India is violated. I am of the view that there is no substance in this contention looked at from either point of view. A drug in the form of pills, dilutions, syrups or powders does not stand on the same footing as a drug in the form of injections. The injections are essentially and basically different from the other forms of drug both with reference to the method and manner of administration and with eference to the reactions and effects hey may have from the point of view of time-factor. Consequently, the classification between injections on the one hand and pills, dilutions, syrups and powders on the other cannot be said to be an invalid or irrational classification offending Article 14 of the Constitution of India.

7. So also the challenge to the definition contained in clause (*dd*) of rule 2, on the basis of comparison between an injection prepared according to the allopathic system and an injection prepared according to homeopathic system is also without substance. The respondents have contended that the Homeopathic Pharmacopoeia neither of the United States nor of the United Kingdom nor of Germany contains a homeopathic drug to be administered in the parenteral route, while this is not the position with regard to the allopathic pharmacopoeia. Consequently there can be a valid distinction and classification between a homeopathic injection and an allopathic injection in the sense that a homeopathic injection is not recognised and well known in the pharmacopoeia as relevant thereto, while an allopathic injection does not suffer from the same infirmity. Hence, in my opinion, the argument based upon Article 14 of the Constitution of India, with reference to the distinction made between the homeopathic medicines themselves such as pills, dilutions, syrup and powders being dealt with in one manner and injection being dealt with in another manner or with reference to the distinction made between allopathic injections and homeopathic injections should fail.

8. The second argument based upon Article 19 (1) (*g*) of the Constitution of India equally fails. Article 19 (1) (*g*) deals with the right to practise any profession or to carry on any occupation, trade or business. Sub-clause (6) of Article 19 enables the State to impose reasonable restrictions in the interests of the general public, on the exercise of the right conferred by the said clause (19 (1) (*g*)). The restriction, if any, with regard to the homeopathic injections in the Rules under consideration, was made in the interests of the general public, because homeopathic injections have not been recognised as drugs in the relevant pharmacopoeias. As I have already pointed out, when the petitioner was required to furnish necessary particulars for the purpose of testing and analysing the suitability of the drug, he has failed to furnish those particulars. In view of this, it is not open to the petitioner now to contend that clause (*dd*) of rule 2 violates Article 19 (1) (*g*) of the Constitution of India.

9. Independent of the above considerations, there are one or two matters which also have to be referred to for the purpose of showing that the petitioner is not entitled to any relief in this writ petition. As I have stated already, the petitioner has prayed for the issue of a writ of *mandamus* to the respondents herein to issue a licence to the petitioner for the manufacture and sale of homeopathic injections in its factory at Thiruvarur. I repeatedly asked the learned Counsel for the petitioner to show me any statutory provision either in the Act or in the Rules with reference to which the petitioner can claim that the three respondents are under a legal obligation to grant a licence to the petitioner herein. As I have mentioned already, the petition itself refers to rule 85-B only of the Drugs and Cosmetics Rules, 1945 and that rule does not impose an obligation on any one of the three respondents in the writ petition to issue a licence to the petitioner herein. In view of this, the petitioner is not entitled to have a writ of

mandamus because it is well established that a writ of *mandamus* will issue only for the purpose of enforcing a legal duty of a public nature imposed upon the respondents which the respondents owe to the petitioner herein.

10. The second aspect to which I want to draw attention is, that both respondents 2 and 3 have contended in their counter-affidavits that the homeopathic injections, in view of the fact that they do not find a place in the relevant pharmacopoeias, will constitute only a 'new drug' and for the purpose of getting a licence for such a new drug, the petitioner must get the approval of the Drugs Controller and for the purpose of granting that approval, the Drugs Controller called upon the petitioner to furnish certain necessary information which the petitioner has failed to furnish. In this context, it is necessary to refer to rule 85-C of the Rules which deals with application to manufacture 'New Homeopathic medicines'. This rule states that no 'New Homeopathic medicine' shall be manufactured unless it is previously approved by the Licensing Authority mentioned in rule 21 and the manufacturer of 'New Homeopathic medicine' when applying to the Licensing Authority mentioned in sub-rule (1) shall produce such documentary and other evidence as may be required by the Licensing Authority for assessing the therapeutic efficacy of the medicine including the minimum provings carried out with it. It is with reference to this rule, the respondents put forward the contention that the petitioner was required to supply necessary materials and particulars and that he has failed to do so. It is in this context the third respondent further contends that no order of refusal has been passed against the petitioner and that the petitioner's application is still under consideration. It is necessary at this stage to refer to the definition of the term 'New Homeopathic medicine' as contained in 30-AA. The definition is given in the form of an Explanation to this rule and that Explanation is:

> " 'New Homeopathic medicine' means a Homeopathic medicine which is not specified in the Homeopathic pharmacopoeias of the United States or the United Kingdom or which is not recognised in authoritative Homeopathic literature as efficacious under the conditions recommended.' "

In view of this stand taken by the respondent also, it is not possible for this Court to issue a writ of *mandamus* directing the respondents to grant a licence to the petitioner as prayed for.

11. Apart from the contention based upon Articles 14 and 19 (1) (*g*) of the Constitution of India, no other argument regarding the invalidity of clause (*dd*) of rule 2 of the Drugs and Cosmetics Rules, 1945, was put forward before me.

12. Under these circumstances, the writ petition fails and is dismissed. There will be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Karuppanna Goundar and another .. *Appellant**

v.

Chinna Nachammal and others .. *Respondents.*

Hindu Law—Joint family properties—Father dying intestate—Suit for partition—Unmarried daughter—Entitled to share in the joint in father's estate—Whether can claim provision for her marriage expenses—Hindu Succession Act (XXX of 1956), *section* 6, *Hindu Adoptions and Maintenance Act (LXXVIII of* 1956), *sections* 3 (b), (4).

If a statute codified the law, then the statute alone has to be looked into to ascertain the rights of parties regarding the matters dealt with therein and the pre-existing law cannot be borrowed.

[*Para.* 11.]

Undoubtedly maintenance is a matter for which provision is made in the Act

* S.A. No. 678 of 1970 and memo of cross objections. 26*th March*, 1973.

LXXVIII of 1956 and therefore any one claiming maintenance, which takes in the marriage expenses of an unmarried daughter, would have to work out his or her rights only under the provisions of the Act and the textual Hindu Law cannot be invoked at all. Even if a person who was entitled to maintenance under the textual Hindu Law has not been given a right of maintenance under the provisions of the Act, he or she cannot say that he or she would rely upon the textual law to enforce the right.

[*Para.* 11.]

The textual law as well as statute law cannot be in force at one and the same time regarding the particular matter *viz.* maintenance. [*Para.* 11.]

The unmarried daughter who gets a share in her father's estate is not entitled for a provision being made for her marriage expenses. [*Para.* 7.]

Daughters, whose marriages are performed prior to partition in the joint family no doubt get an advantage, in that their marriages are performed from out of the joint family funds and a daughter who remains unmarried at the time of partition has to go without a provision for her marriage expenses from out of the joint family properties. From this inequality alone one cannot contend that even after the coming into force of the Act (LXXVIII of 1956), the textual law can be invoked in the face of section 4. [*Para.* 16.]

Cases referred to:—

Nalla Lalithamba v. *Yalla Venkatalaxmi*, (1970) 1 An.W.R. 245; *Subbayya* v. *Ananta Ramayya*, (1930) I.L.R. 53 Mad. 84 : A.I.R. 1929 Mad. 586 : 57 M.L.J. 826; *Arumugha Udayar* v. *Velliammal*, (1969) 2 M.L.J. 403 : A.I.R. 1969 Mad. 72: 81 L.W. 257; *Ramamoorti* v. *Sitharamamma*, (1960) 2 An.W.R. 352 : A.I.R. 1961 A.P. 131; *Gopala Rao* v. *Sitharamamma*, (1966) 2 M.L.J. (S.C) 17 : (1966) 2 An.W.R. (S.C.) 17 : A.I.R. 1965 S.C. 1970; *Govardhan* v. *Gangabai*, A.I.R. 1964 M.P. 168; *Nanak Chand* v. *Chandra Kishore*, (1970) 1 S.C J. 176 : (1970) M.L.J. (Crl.) 94 : (1970) 1 S.C.R. 565.

Appeal and Memo of Cross Objections against the Decree of the Court of the Subordinate Judge, Dindigul, dated 7th March, 1969 in Appeal Suit No. 198 of 1967 preferred against the decree of the Court of the District Munsif of Palani in Original Suit No. 406 of 1964.

K. Parasurama Iyer, for Appellants.

K. Sarvabhauman and *T. R. Mani*, for Respondents.

The Court made the following

ORDER.—(21*st December*, 1972). In addition to other questions, one important question that is raised in the present second appeal is whether an unmarried daughter who obtains a share in the estate of her father in the coparcenary on his death as his heir under the proviso to section 6 of the Hindu Succession Act (Central Act XXX of 1956) is entitled to a provision for her marriage expenses in a suit for partition of the coparcenary property. In this case one Kandasami Gounder died on 26th September, 1964, survived by five daughters, the plaintiff, 2nd defendant, 3rd defendant, 4th defendant, 5th defendant, his widow, the 6th defendant and his only son the 1st defendant. The suit was instituted by the plaintiff one of the daughters for partition of the estate of her father. The 5th defendant is the unmarried daughter of the deceased. Both the Courts below accepting the claim of the 5th defendant have made a provision of Rs. 2,500 towards her marriage expenses out of the estate. The correctness of this conclusion is contested by the 1st defendant in the suit.

2. Thiru K. Parasurama Iyer, the learned Counsel for the appellant contends that under section 3 (*b*) of the Hindu Adoptions and Maintenance Act (Central Act LXXVIII of 1956), the term "maintenance" used in the Act includes in the case of unmarried daughter the reasonable expenses of and incidental to her marriage. Sub-section (2) of section 22 provides that where a dependant has not obtained, by testamentary or intestate succession any share in the estate of a Hindu dying after the commencement of the Act, the depandant shall be entitled, subject to the provisions

of this Act, to maintenance from those who take the estate. Thiru Parasurama Iyer contends that in view of these provisions in Central Act LXXVIII of 1956, the 5th defendant, in addition to her share in the father's interest, has no right to claim any sum towards her marriage expenses out of the coparcenary property. In support of this contention, he relies on a decision of the Andhra Pradesh High Court in *Nalla Lalithamba v. Yalla Venkatalaxmi*[1].

3. As against this contention of Thiru Parasurama Iyer, Thiru T. R. Mani, the learned Counsel for the 5th defendant, contends that under the textual Hindu Law the marriage provision in favour of a daughter was considered to be in lieu of her share in the coparcenary property and under section 6 of Central Act XXX of 1956 the daughter gets a share not in the entire coparcenary property but only in her father's interest in the coparcenary property and consequently as per the provisions contained in Central Acts XXX of 1956 and LXVIII of 1956 it cannot be said that the marriage expenses which are included in the term "maintenance" are provided in favour of an unmarried daughter in lieu of her share in the coparcenary property since she gets a share not in the coparcenary property but only in her father's interest in the coparcenary property, which depending upon the circumstances of the particular case may be much less than what a reasonable provision for the marriage expenses out of the joint family estate would be. This aspect of the matter has not been considered by the High Court of Andhra Pradesh in the decision referred to above. Further, if the argument of the appellant is accepted, a married daughter whose marriage has been performed out of the joint family funds will get the same share as an unmarried daughter whose maririage will have to be performed out of that share only. This aspect also should be taken into account in considering the question. In my opinion, the above argument deserves to be considered and the question is an important one and it is conceded by Counsel on both the sides that there is no decision of this Court on this point.

4. In view of this, I am of opinion that it is desirable that the question is considered by a Bench of this Court and consequently I direct the papers to be placed before My Lord, the Chief Justice, for direction as to posting of the second appeal before a Bench for disposal.

The Judgment of the Court was delivered by

Ramaswami, J.—This Second Appeal with the cross-objections is before us on a reference made by Ismail, J. The question which was raised before the learned Judge resulting in the matter being placed before a Bench is whether an unmarried daughter of a Hindu who gets a share in his estate would still be entitled for a provision for her marriage expenses in a suit for partition. One Kandasami Goundar who died on 26th September, 1964 was the *Karta* of a Hindu joint family. His only son is Karuppanna Goundar, the 1st defendant in the suit for partition instituted by one of the daughters of the said Kandasami Goundar who left his widow Sellammal (who has been impleaded as the 6th defendant in the suit) and five daughters apart from his son Karuppanna. The eldest of the five daughters by name Chinna Nachammal is the plaintiff and the other four daughters have been impleaded as defendants 2 to 5 respectively. All the daughters except the last one by name Subbathal (5th defendant in the suit) have already been married.

6. Under section 6 of the Hindu Succession Act (XXX of 1956), the interest of Kandasami Goundar in the joint family properties would not go to his son by survivorship but would devolve on his widow, son and daughters. As per *Explanation* I to that section, the interest of Kandasami Goundar shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death and therefore what devolved on his widow, son and daughters is admittedly the half share in all the family properties. It is not in dispute that out of the entirety of the joint family properties, the widow and the five daughters would each be entitled to a 1/14th share and the son would take 8/14 share 7/14 representing his interest in the joint

1. (1970) 1 An.W.R. 245.

family properties plus 1/14. Subbathal (5th defendant), the unmarried daughter, contended that provision should be made towards her marriage expenses. Though this had been resisted by the 1st defendant, the Courts below have held that provisions should be made towards her marriage expenses from out of the entire joint family properties and fixed a sum of Rs. 2,500 as the proper provision in that record.

7. The second appeal has been filed by the 1st defendant as well as his wife who has been impleaded as the 7th defendant in the suit. There are certain other questions in dispute between the parties with which the 7th defendant is concerned and we would come to that a little later. The question of law raised before Ismail, J., when the matter came up before the learned Judge is that by virtue of the provisions contained in the Hindu Adoptions and Maintenance Act, 1956 (LXXVIII of 1956) (hereinafter referred to as the Act), the unmarried daughter who gets a share in her father's estate is not entitled to a provision for her marriage expenses. As there is no precedent in this Court on the point raised, the learned Judge thought that it would be better if the matter is dealt with by a Bench and that is how it is before us. The question does not present any difficulty at all. We are quite clear that in the present case the unmarried daughter who gets a 1/7 share in her father's estate (1/14 share in the entire joint family properties) is not entitled for a provision being made for marriage expenses.

8. The relevant provisions of the Act, *viz.*, section 4 and Chapter III (sections 18 to 28) have to be read;

"*Section* 4. Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act:

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act".

The various sections in Chapter III need not be quoted. It will suffice to note that section 18 deals with maintenance of wife, that section 19 deals with maintenance of widowed daugher-in law, section 20 deals with maintenance of children and aged parents while section 22 deals with maintenance of dependants. Section 21 states who the dependants are for purposes of that chapter. An unmarried daughter is a dependant of either of her parents. There are other dependants mentioned under this section, but we are not concerned with them. Section 22 which provides for maintenance of dependants is as follows:

"22. (1) Subject to the provisions of sub-section (2) the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) the liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act. "

Sections 23 to 27 deal with the quantum of maintenance and other details including as to when maintenance wou'd be a charge. Section 28 deals with the effect of transfer of property on right to maintenance.

9. Section 3 (*b*) of the Act defines the word "maintenance" and it is as follows:

"'maintenance' includes—

(*i*) in all cases, provision for food, clothing, residence, education and medical attendance and treatment; (*ii*) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage".

Maintenance (which term includes reasonable expenses of marriage of an unmarried daughter) is undoubtedly a matter for which provision has been made in the Act. If that is the correct position, then as per the terms of section 4 quoted above the textual Hindu Law, which was in force prior to the coming into force of the Act, shall not come to have effect. However, Mr. T. R. Mani, the learned Counsel for the contesting respondents, contends that under section 6 of the Hindu Succession Act, the unmarried daughter (as well as the other daughters) get a share only in the interest of the father in the joint family properties and as a corollary, the effect of section 22 (2) of the Act would be such unmarried daughter would not be entitled to maintenance from those who take the said estate and that these provisions cannot abrogate the right of an unmarried daughter under the textual law to claim maintenance inclusive of marriage expenses against the entire coparcenary property. The substance of the contention is that because under section 22 (2) there is reference only to maintenance from those who take the estate of the deceased and not to maintenance out of the entire coparcenary property, the right of the unmarried daughter as per the textual law to proceed against that part of the coparcenary property, which is not the estate of the deceased under section 6 of the Hindu Succession Act, has not been taken away by the provisions of the Act. This is certainly not tenable. If what the learned Counsel contends is correct, then the unmarried duaghter in this case has no claim for maintenance which takes in the marriage expenses against the half share of the father which devolved on the widow, son and daughter, but only against the half share of the son, *viz.*, the 1st defendant. In order to see whether provision has been made in the Act in respect of a "matter", it is not correct to take the quantum of right that is provided for, compare it with the quantum of right under the textual law and say that provision has not been made regarding the "matter" on the ground that certain part of the right as per the textual law has not been given under the statute.

10. The learned Counsel points out that under the old textual law as declared by the Full Bench of this Court in *Subbayya* v. *Ananta Ramayya*[1], the right of the daughter to her marriage expenses and maintenance is based on her right to or interest in the joint family property, that this is an obligation of the joint family property which is not affected by partition and that even on partition the son's share is also liable for the marriage expenses of the daughter of the father in proportion to the son's share in the property divided. His contention is that under the textual law, the right to maintenance, inclusive of marriage expenses of an unmarried daughter, was in lieu of her right or interest in the entire joint family property and under the Hindu Succession Act, the unmarried daughter gets a share only in the father's interest in the joint family properties and not in the entire joint family properties and that the right to maintenance provided under section 22 (2) of the Act only to such dependant who has not obtained a share in the estate of the deceased, would in no way affect the right to maintenance and marriage expenses which the unmarried daughter would have from out of the remaining part of the joint family property.

11. We are of the opinion that the learned Counsel's approach to the question is wholly incorrect. The question is not, what exactly is the right of maintenance (which takes in the marriage expenses) that has been provided for under the Act. The Act (LXXVIII of 1956) is one to amend and codify the law relating to adoptions and maintenance among Hindus, as stated in the long title of the

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1. (1930) I.L.R. 53 Mad. 84; 57 M.L.J. 826: A.I.R. 1929 Mad. 586.

Act. It is indisputable that if a statute codifies the law, then the statute alone has to be looked into to ascertain the rights of parties regarding the matters dealt with therein and the pre-existing law cannot be borrowed. In *Arumugha Udayar* v. *Velliammal*[1], Ramamurti, J., observed (in a case under the very Act which is now under consideration):

> "In the case of codifying statutes, it is a settled rule of construction that in respect of matters specifically dealt with by the statute, earlier law cannot be invoked for the purpose of adding to it something which is not there. The true meaning of the provisions of the Act ought not to be influenced by considerations derived from the previous state of law".

With respect, we agree that that is a correct statement of law. However, the learned Counsel contends that the case before Ramamurti, J., was one relating to adoption and not maintenance, that in the Act there is a specific provision regarding adoption in the shape of section 5 of the Act which says that adoption made not in accordance with the provisions of the Act shall be void, that there is no such provision regarding maintenance and that therefore there could be no bar to look to the textual law regarding the present question. Chapter II of the Act deals with adoption and as already noted, Chapter III of the Act deals with maintenance. Section 5 is the first section in Chapter II and that says that no adoption shall be made after the commencement of the Act except in accordance with the provisions of that Chapter and any adoption made in contravention of the said provisions shall be void. The contention of the learned Counsel is that as there is no similar provision in Chapter III dealing with maintenance, there is no bar to rely upon the textual law. No doubt there is no provision in Chapter III similar to section 5 in Chapter II. But that certainly does not help the learned Counsel, for section 4, which applies to adoption as well as maintenance, clearly lays down that the textual law shall cease to have effect with respect to any matter for which provision is made in the Act. Undoubtedly maintenance is a matter for which provision is made in the Act and therefore any one claiming maintenance, which takes in the marriage expenses of an unmarried daughter, would have to work out his or her rights only under the provisions of the Act and the textual Hindu Law cannot be invoked at all. Even if a person who was entitled to maintenance under the textual Hindu Law has not been given a right of maintenance under the provisions of the Act, he or she cannot say that he or she would rely upon the textual law to enforce the right. For instance, formerly the concubine of a Sudra was entitled to maintenance from out of his estate in the hands of the persons who take the estate. But under Chapter III of the Act no such right is given to her. Can it be said that because there is no provision for payment of maintenance to such concubine from out of the estate of the deceased made in the Act, she can rely upon the textual law? Surely she cannot. The effect of section 4 of the Act is that only such of those persons for whom right to maintenance is provided for under Chapter III of the Act and that too only to the extent of the right declared therein, can have a valid claim. The textual law as well as statute law cannot be in force at one and the same time regarding the particular matter, *viz*., maintenance. As the Act is a codifying law relating not only to adoptions but also to maintenance among Hindus and as section 4 of the Act clearly says that all textual law in force before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act, there is no escaping the position that right to maintenance (inclusive of marriage expenses for unmarried daughter) has to be worked out only as per the provisions of Chapter III of the Act and no textual law can be invoked by any one.

12. The only direct authority brought to our notice on the point in controversy is *Nalla Lalithamba* v. *Yalle Venkatalaxmi*[1]. That is also a case where an unmarried daughter, who took a share in her deceas-

1. (1969) 2 M.L.J. 403 at 406 : 81 L.W. 257 : A.I.R. 1969 Mad. 72.

1. (1970) 1 An. W.R. 245.

ed father's estate, claimed provision for marriage expenses. A Bench of the Andhra Pradesh High Court held that she was not entitled to such a claim. That is the conclusion that we have also reached, as seen earlier. However, before the learned Judges of the Andhra Pradesh High Court, the point had not been raised in the form in which it has been raised before us. It had not been contended in that case that as the provision regarding maintenance under section 22 of the Act is related to the estate of the deceased a dependant who gets a share in such estate is denied right of maintenance only from those who take the estate, that therefore, the abrogation of the textual law under section 4 of the Act would be limited to the maintenance right in lieu of the estate of the deceased and that such textual law as against the remaining part of the joint family property cannot be said to have been abrogated. We have already said that such a contention is wholly untenable and it is not surprising that such contention had not been put forward before the Andhra Pradesh High Court. We respectfully agree with the conclusion of the learned Judges of the Andhra Pradesh High Court that the unmarried daughter who takes a share in her father's estate is not entitled to caim a provision for marriage expenses separately.

13. The learned Counsel contends that the above case of the Andhra Pradesh High Court has overlooked a Full Bench decision of the same Court in *Ramamoorty* v. *Sitharamamma*[1], and that therefore that decision cannot be considered to be good law. This contention is fallacious. An examination of the Full Bench decision in *Ramamoorty* v. *Sitharamamma*[1], would show that far from the same helping the present contention of the learned Counsel, it is really against him. In that case, the question was about the right of maintenance of an *avaruddha stree* (concubine) of a Sudra, which right came to be vested in her prior to the coming into force of the Act. The man who kept her as his mistress died even in 1948, much prior to the coming into force of the Act. Under the textual law, the concubine of a Sudra was entitled to maintenance from out of the estate of the paramour in the hands of those who take the estate. The Full Bench of the Andhra Pradesh High Court pointed out that the Act, which was passed in 1956 whereunder such a concubine would not have a valid claim for maintenance from out of her paramour's estate, would not affect the rights of the concubine in that case inasmuch as a right had become vested in her owing to the fact that the paramour died prior to the coming into force of the Act. We are unable to see how this decision would help the learned Counsel in this case. At page 134, column 2, the Full Bench of the Andhra Pradesh High Court, referring to section 22 and other sections in the Act, observed:

> "In our considered opinion, these sections do not bear on the pre-existing rights of maintenance-holders. The Act does not abridge those rights and leaves them untouched."

The learned Counsel relies upon the above observation and contends that by virtue of the textual Hindu Law as declared by *Subbayya* v. *Ananta Ramayya*[1], the unmarried daughter had a right of maintenance and provision for marriage expenses in lieu of her share in the entire joint family property and that the provision in the Act cannot affect the abovesaid pre-existing rights. There is a good deal of confusion in this argument. The learned Counsel mixes up the pre-existing law with pre-existing rights. In the case before the Full Bench of the Andhra Pradesh High Court, the concubine had a pre-existing vested right inasmuch as the paramour had died prior to the coming into force of the Act. Therefore the Full Bench held that such vested right cannot be taken away by the law being changed under the Act. But here the unmarried daughter certainly did not have any vested right prior to the coming into force of the Act, inasmuch as her father died only subsequently. It is significant to note that in the above case the Full Bench of the Andhra Pradesh High Court, after the observation relied on by the learned Counsel which has been quoted above, has said that the

1. (1960) 2 An.W.R. 352 : A.I.R. 1961 A.P. 131 (F.B.)

1. (1930) I.L.R. 53 Mad. 84 (F.B.): 57 M.L.J. 826.

right of maintenance which the concubine had acquired against the estate of her deceased paramour prior to the Act is not nullified by the Act since sections 21 and 22 leave the estates of Hindus, whose death occurred before the Act, unaffected. By implication the above decision means that in respect of rights that arise after the commencement of the Act, one has to be governed by sections 21 and 22 of the Act, as the estates of Hindus, whose death occurred after the Act, would certainly be affected by those sections. There can be no doubt that the unmarried daughter in the present case had no vested right prior to the commencement of the Act. No doubt under the pre-existing law she had certain rights. But the said law has been validly abrogated by the Act which is a codifying law regarding maintenance (marriage expenses included) as well as adoption.

14. The case before the Full Bench of the Andhra Pradesh High Court referred to above had been taken to the Supreme Court and the decision of the Supreme Court has been reported in *Gopala Rao* v. *Sitharamamma*[1]. There also it was held, the rights of maintenance of the concubine, which had become vested in her on the death of her paramour prior to the coming into force of the Act, cannot be affected by the Act which came into force subsequently. Their Lordships of the Supreme Court have held that the provisions of sections 21 and 22 of the Act are not retrospective in character and therefore the right of maintenance, which had become vested in the concubine, would in no way be affected by the provisions of the Act. Their Lordships observe at page 1973:

> "Now, before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were acquired, and the corresponding liability to pay the maintenance was incurred under the Hindu Law in force at the time of his death. It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction....... We think that sections 21 and 22 read with section 4 do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu Law in force at the time of his death.
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> "On the death of Lingayya, the 1st respondent as his concubine and the second, third and fourth respondents as her illegitimate sons had a vested right of maintenance during their lives out of the estate of Lingayya. This right, and the corresponding liability of the appellants to pay maintenance are not affected by sections 21 and 22 of the Act. The continuing claim of the respondents during their lifetime springs out of the original right vested in them on the death of Lingayya and is not founded on any right arising after the commencement of the Act."

It is needless to say that in the present case there was no such vested right in the unmarried daughter for the simple reason that her father died only subsequent to the coming into force of the Act. As a matter of fact in the above case, the Supreme Court has made the following observations which would clearly support the conclusion that we have reached earlier. At page 1973, earlier to the passage quoted above, their Lordships observed, after noting the purport of section 22 of the Act:

> "Specific provision is thus made in section 22 with regard to maintenance of the dependants defined in section 21 out of the estate of the deceased Hindu, and in view of section 4, the Hindu Law in force immediately before the commencement of the Act ceases to have effect after the commencement of the Act with respect to matters for which provision is so made. In terms, sections 21 and 22 are prospective."

15. The learned Counsel referred to a decision of the Madhya Pradesh High Court in *Gowardhan* v. *Gangabai*[1], where it has been observed, referring to sections 21 and 22 of the Act:

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1. (1966) 2 S.C.J. 179: (1966) 2 M.L.J. (S.C.) 17: (1966) 2 An.W.R. (S.C.) 17 : A.I.R. 1965 S.C. 1970.

1. A.I.R. 1964 M.P. 168.

"Reading sections 21 and 22 together, we are of the opinion that those sections are intended to create an additional liability of maintenance on moral consideration on certain relations of the dependants. These sections do not, in any way, affect the general rule of Hindu Law that where a husband leaves share in the joint family property, his widow is entitled to maintenance out of it from those coparceners who hold that by survivorship. This view finds support from the decision in *Ramamoorty* v. *Sitharamamma*[1]".

In the case before the Madhya Pradesh High Court also, it was a question of the right of maintenance having vested in the claimant before the coming into force of the Act. The widow of one Kapil who died in the year 1940 claimed maintenance from out of the estate of her late husband. She was not entitled to a share in the properties left by her husband. The Madhya Pradesh High Court negatived the contention that the widow was not entitled to maintenance pointing out: "The right of a widow for maintenance legally arises because of the fact that her husband left an interest in the joint family property at the time of his death, and the coparceners of the family by merely dividing the joint family property in a partition cannot give a go-by to her right". Therefore that is really a case where the right of maintenance had become vested in the claimant even in the year 1940, very much prior to the commencement of the Act and therefore. on the principle stated by the Full Bench of the Andhra Pradesh High Court in *Ramamoorty* v. *Sitharamamma*[1], (later confirmed by the Supreme Court as seen above), such vested right would not be abrogated by the provisions of the Act. The conclusion of the Madhya Pradesh High Court that sections 21 and 22 of the Act have no application to such a case is perfectly justified. It is in this context the observations of the learned Judges of the Madhya Pradesh High Court relied on by the learned Counsel (quoted earlier) have to be understood. As already noted, this decision only follows *Ramamoorty* v. *Sitharamamma*[1], which decision has been confirmed by the Supreme Court.

16. It cannot be contended that the textual Hindu Law regarding provision for marriage expenses should be held to be not abrogated by the provisions in the Act on the ground that it would result in inequality between one daughter and another. Daughters, whose marriages are performed prior to partition in the joint family no doubt get an advantage, in that their marriages are performed from out of the joint family funds and the daughter who remains unmarried at the time of partition has to go without a provision for her marriage expenses from out of the joint family properties. From this inequality alone one cannot contend that even after the coming into force of the Act, the textual law can be invoked in the face of section 4 which specifically says that in respect of all matters for which provision is made in the Act, the textual law shall cease to have force. Such inequality as pointed out above would arise not only in the case of daughters but also in the case of sons. There may be cases where only some of the sons get married prior to partition and for their marriages joint family funds had been utilised. But on that score the sons, whose marriages are yet to be performed on the date of partition, cannot ask for special provision being made towards their marriage expenses, for Hindu Law never recognised such provision being made. When unmarried sons are placed in a disadvantageous position when compared to married sons in this regard, we do not see how such dissimilarity among daughters would in any way be helpful in deciding the point in controversy.

17. The learned Counsel also invited our attention to *Nanak Chand* v. *Chandra Kishore*[2]. That is a case where the Supreme Court held that section 4 (*b*) of the Act does not repeal or affect in any manner provisions of section 488 of the Code of Criminal Procedure and that there is no inconsistency between the Act and the abovesaid section in the Code of Criminal Procedure. Their Lordships

1. (1960) 2 An.W.R. 352 : A.I.R. 1961 A. P. 131 (F. B.).

1. (1960) 2 An.W.R. 352 : A.I.R. 1961 A. P. 131 (F.B.).
2. (1970) 1 S.C.J. 176 : (1970) M.L.J. (Crl.) 94: (1970) 1 S.C.R. 565 : A.I.R. 1970 S.C. 446.

have pointed out that the Act, as well as section 488 of the Code of Criminal Procedure, can stand together as the scope of the two laws is different inasmuch as while the Act is one amending and codifying the law relating to adoptions and maintenance among Hindus, section 488 of the Code of Criminal Procedure provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. We do not see the relevancy of this decision as far as the point now under consideration is concerned. Therefore, our conclusion is that the 5th defendant in the suit is not entitled to a provision for marriage expenses. The appeal filed by defendants 1 and 7 has to be allowed to that extent.

18. Two other questions are raised by defendants 1 and 7 in this second appeal. The first is in respect of two promissory notes which the 1st defendant had executed in favour of two strangers, one for Rs. 2,000 and the other for Rs. 1,000. It was claimed that these amounts had been borrowed for the purpose of the joint family and therefore the debts should be treated as joint family debts. Both the Courts below have held that these two debts are only personal to the 1st defendant, that they had not been borrowed for joint family purposes and that they cannot be treated as joint family debts. This finding is based on evidence and we do not find any ground whatsoever to disturb such a finding. Certainly there is no error of law regarding this aspect. The learned Counsel for the appellants (defendants 1 and 7) also did not seriously press this point.

19. The other question raised in the second appeal is about two mortgages covered by Exhibits B-5 and B-6 standing in the name of the 7th defendant, the wife of the 1st defendant. The Courts below have held concurrently that the 7th defendant is only a benamidar, that the monies under the abovesaid two mortgages had been advanced by Kandasami Goundar, the *karta* of the family, and that the mortgages had been taken in the name of the 7th defendant. The case of the plaintiff has been that the mortgages had been taken benami in the name of the 7th defendant, as she happened to be the only daughter-in-law of the family and the consideration for the mortgages came only from her father Kandasami Goundar and that the 7th defendant had absolutely no means of her own to advance monies on the said mortgages. This case has been accepted by the trial Court as well as the first appellate Court. The learned Counsel for the appellants (defendants 1 and 7) contends that the Courts below—particularly the first appellate Court have thrown the burden of proof wrongly on the 7th defendant regarding this question and therefore the finding has been vitiated. We were taken through that portion of the judgment of the first appellate Court as well as that of the trial Court and we are satisfied that there is no question of throwing the burden of proof wrongly. The issue raised correctly throws the burden on the plaintiff to prove the benami nature of the transaction. The Courts below have accepted the evidence of the plaintiff that the monies had been advanced only by her father and that the 7th defendant is only a benamidar. The plaintiff is a widowed daughter and she had been living with her father, brother (1st defendant) and sister-in-law (7th defendant) during the relevant time. So it cannot be said that she had no personal knowledge about these transactions. The Courts below have also pointed out that the evidence showed that the 7th defendant could not have had any means of her own for advancing the monies on the two mortgages. Under these circumstances, we do not find any ground to interfere with the finding of the Courts below.

20. In the cross-objections filed by the plaintiff, the question raised is about a particular property standing in the name of the 1st defendant. The plaintiff's case is that the property in question had been purchased by her father for the family, but the sale deed Exhibit B-4 had been taken in the name of the 1st defendant benami. This case, though had been accepted by the trial Court, has not been accepted by the first appellate Court which found that the consideration for the purchase of the property had not come from the joint family funds and that the property is the absolute property of the 1st defendant. Though the first appellate Court has reversed the finding of the trial Court regarding this point, we do not find any error of law

calling for interference. The question whether the property in question is joint family property or whether it exclusively belonged to the 1st defendant, is only a question of fact and there is a clear finding regarding that by the first appellate Court. We cannot interfere with the same.

21. The result is, the appeal is partly allowed and the provision of Rs. 2,500 towards marriage expenses of the 5th defendant in the suit is negatived. In other respects, the appeal, is dismissed, but under the circumstances, without costs. The cross-objections is also dismissed without costs.

S.J. ———*Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—*M. M. Ismail* and *K. S. Palaniswamy, JJ.*

Messrs. Engineers International having its office at Kalakshetra, Madras-28 *Appellant**

v.

C. Hanumantha Raju and others *Respondents.*

and

C. Sakkubai and others *Cross-Objectors.*

v.

M/s. Engineers International and another *Respondents.*

Fatal Accidents Act (XIII of 1855), *sections* 1-A *and* 2—*Fatal injury caused by fall of truss—Parachute factory—Construction by independent contractor under contract with Central Government—Victim, government official on duty supervising some work at the construction spot—Claim for damages, and loss to estate—Burden of proof*—Prima facie *negligence—Maxim*—Res ipsa loquitur—*Applicability—Respective scope of section* 1-A *and section* 2.

A Government official while on duty at the spot where construction work of a parachute factory was being carried out by an independent contractor under a contract with the Central Government was killed by the fall of a truss which had been temporarily hoisted. Actually all the thirteen temporarily hoisted trusses fell down. A suit was filed for recovery of damages for his death and for loss suffered by the estate.

Held, The falling of all the trusses by itself raises a presumption of negligence on the part of the defendant (contractor). The maxim *res ipsa loquitor* will be rightly applicable. The burden shifts to the defendant to show the care and precautions taken by him so as to negative negligence. [*Para.* 9.]

The same persons cannot take benefit under sections 1-A and 2 of the Fatal Accidents Act. Under the former section damages are payable in respect of loss sustained by the persons mentioned therein; under the latter, compensation goes for the benefit of the estate and damages can be claimed *inter alia* for loss of expectation of life. [*Paras.* 11 & 13.]

On the facts, in the instant case, it was held that the parents had no claim under head (1) but only the widow and sons of the deceased and that the mother will be eligible in respect of head (2).

Cases referred to:

Barkway v. *South Wales Transport Company,* (1948) 2 All E.R. 460; *Laurie* v. *Raglan Building Company,* L.R. (1942) 1 K.B. 152; *Gobald Motor Service Ltd.* v. *R. M. K. Veluswami,* (1962) 1 An.W.R. (S.C.). 105 : (1962) 1 M.L.J. (S.C.) 105 : (1962) 1 S.C.J. 206 : (1962) M.L.J. (Crl.) 120 : (1962) 1 S.C.R. 929 : A.I.R. 1962 S.C. 1; *Secretary of State* v. *Gokal Chand,* (1925) I.L.R. 6 Lah. 451; *C. K.S. Iyer* v. *T. K. Nair,* (1970) 2 S.C.J. 381: (1970) M.L.J. (Crl.) 691 : (1970) 2 S.C.R. 688 : A.I.R. 1970 S.C. 376.

Appeal against the Decree of the Court of the Subordinate Judge, Chingleput, in Original Suit No. 98 of 1963.

R. Gopalaswami Ayyangar and *M. Srinivasan,* for Appellant.

A. K. Shanmugasundaram and *S. K. Rajavelu,* for Respondents.

* A. No. 352 of 1966 and Memo. of Cross Objections. · 15*th December,* 1972.

The Judgment of the Court was delivered by

Palaniswamy, J.—This appeal arises out of a suit instituted for recovery of damages under the Fatal Accidents Act, 1855. The Union of India, in the Ministry of Defence, the second defendant, had entrusted, on contract basis, the construction of a Parachute Factory at Avadi with Messrs. Engineers International, the first defendant, a partnership firm. One Lachi Raju, an Engineer under the service of the Union of India as Superintendent, Grade I, was at the place of construction and discharging certain duties. On 7th March, 1963, the first defendant firm was erecting trusses with the help of its employees. 13 trusses were hoisted temporarily before they were to be permanently fixed up. A derrick (a contrivance for moving or hoisting heavy weights) fell on one of the trusses, with the result that all the trusses fell down. One of the trusses fell on Lachi Raju causing serious injuries. He was removed to the Military Hospital, Avadi and given treatment. But he expired within half an hour. This suit was instituted by his parents (plaintiffs 1 and 2), his widow (third plaintiff) and children (plaintiffs 4 and 5) to recover a sum of Rs. 65,000 as damages made up of Rs. 5,000 to each of plaintiffs 1 and 2, Rs. 10,000 to each of plaintiffs 3, 4 and 5 and Rs. 25,000 claimed as pecuniary loss suffered by the estate on account of the death of Lachi Raju. The plaintiffs *inter alia* alleged that the cause of the accident was due to the negligence of the employees of the 1st defendant and on account of the failure to take proper and sufficient safety precautions in the process of erecting trusses. They alleged that Lachi Raju was very affectionate and loving towards his parents, wife and children, that on account of the premature death, they were deprived of the help which they were receiving from him and that also the estate had lost pecuniarily on account of the premature death.

2. The first defendant contended that there was no cause of action against it, as Lachi Raju was not under its employ and that it was also not a part of the work of Lachi Raju to be present at the spot of accident. It was also contended that there was no negligence on the part of the first defendant or its employees in the execution of the work and that the plaintiffs are not entitled to recover any damages. The first defendant contested the correctness of the quantum of the damages also.

3. The Union of India admitted that Lachi Raju was employed in the Military Engineering service and was attached to the Parachute Factory at Avadi at the time when he met with his death; but liability was denied contending that the first defendant was an independent contractor and that the Union of India was not liable for any damages for what had happened.

4. The trial Judge found that the first defendant was an independent contractor and that the second defendant, Union of India, was not liable. It was also found that at the time of the accident, Lachi Raju was on duty in connection with some work that was in progress at the place of accident. As regards the cause of the accident, the finding of the trial Judge was that it was due to the negligence on the part of the first defendant. On the question as to the persons entitled to damages, the trial Judge found that plaintiffs 1 and 2, being parents, are not entitled to any relief. The trial Judge examined the evidence with regard to the income which the deceased was getting by way of salary, the amount which he was spending upon his wife and children and the probable savings which he would have made, had he lived his normal span of life, and taking all these circumstances into consideration, the trial Judge fixed a sum of Rs. 10,000 as damages payable to each of the third plaintiff, the widow, and the fifth plaintiff and a sum of Rs. 9,000 to the fourth plaintiff. The trial Judge further awarded a sum of Rs. 5,000 as loss to the estate, and in all a decree for Rs. 34,000 was passed with proportionate costs against the first defendant contractor. It is against this decree that the first defendant has preferred this appeal. Plaintiffs 3, 4 and 5 have filed a Memo. of Cross-objections contending that the Court below should have awarded to them an additional sum of Rs. 21,000 even though it disallowed the claims of plaintiffs 1 and 2.

5. Mr. Gopalaswami Ayyangar, Counsel for the first defendant-appellant raised the following points for consideration:

(*i*) The finding of the Court below that Lachi Raju was on duty at the time and place of the accident is erroneous;

(*ii*) The Court below erred in holding that the accident was due to negligence of the first defendant by applying the principle of *res ipsa loquitur* and failed to note that the burden lay exclusively upon the plaintiffs to establish that the cause of accident was due to the negligence on the part of the first defendant; and

(*iii*) The award of Rs. 5,000 as loss to the estate is wrong, as there is no evidence to show that the estate spent any amount for treatment of the deceased after the accident.

We shall deal with these contentions seriatim.

6. That the first defendant was an independent contractor which is the finding of the Court below, is not contested. That Lachi Raju met with his death as a result of the fall of one of the trusses, which were being erected by the first defendant is also not in controversy. The specific case of the plaintiffs is that the accident took place when Lachi Raju was supervising, in discharge of his duties, the work that was in progress at the Parachute Factory. The first defendant in its written statement has denied this allegation and stated that Lachi Raju was not supervising the work. On the side of the plaintiffs, plaintiffs 3 and 1 gave evidence as P.Ws. 1 and 2 respectively. In the nature of things, they cannot be expected to say anything on the question as to what exactly Lachi Raju was doing at the time and place of the accident. The question has to be examined on broad probabilities. Exhibit B-2 is an office order issued by an officer of the Parachute Factory, Avadi, detailing the various duties of the persons enumerated therein. One such person is Lachi Raju to whom the work allotted consisted of, "excavation, columns, lintels and slabs". Exhibit B-2 also shows that the responsibilities indicated therein should not be taken as a watertight compartment of work and that over and above the items indicated therein jobs would be assigned either in writing or orally at the factory itself. D.W. 1 a partner of the first defendant firm, gave prevaricating versions in his evidence as to the work which Lachi Raju was attending to at the time of the accident. Even in his examination in chief, he admitted in unambiguous terms that the duty of Lachi Raju was to supervise a part of the construction; but he qualified it by saying that Exhibit B-2 set out the duties to be attended to by him. In his cross-examination, he admitted that he could not definitely say the exact work which Lachi Raju was doing at the time of the accident that all the supervisors in charge of steel erections were there at the spot and that there was also floor concrete work being done at the time. His further significant admission is that the work was an emergency work, that the progress of the work was maintained at a fast pace and that more than one type of work was going on at the site. His further significant admission is that all the concerned officers of the M. E. S. must have been there on duty. D.W. 1 was unable to deny that Lachi Raju was on duty at the time of the accident. The first defendant firm did not controvert the statement contained in Exhibit A-3 the report of the Garrison Engineer that at the time of the accident Lachi Raju was on duty. D.W. 1 admitted that the Engineer in charge would inform him from time to time as to the exact duties allotted to the Engineering Supervisors under his charge (Lachi Raju being one of the Engineering Supervisors). But he pleaded ignorance as to what kind of duty was assigned to Lachi Raju at the time of the accident. It is clear from a perusal of his evidence that he does not want to speak out the whole truth by pretending ignorance of relevant facts. Having regard to his significant admissions that several kinds of work were in progress at the time of the accident, as the work was an emergency one, and that all the officers concerned of the M.E.S. should be on duty at that time we are clearly of the opinion that at the time of the accident Lachi Raju was on duty in connection with some work in progress at the place where the accident took place.

7. The next question is whether the plaintiffs have established satisfactorily that the cause of the accident was due to the negligence on the part of the first defendant. The case of the plaintiffs as put forward in the plaint is that the first defendant failed to take sufficient safety precautions, in the carrying out of the work and that as a result of such negligence, the trusses fell down. No doubt, this allegation is denied by the first defe dant. The initial burden lies upon the plaintiffs to establish that the accident was due to the negligence on the part of the first defendant. As we have already pointed out, the only two witnesses examined on the side of the plaintiffs, were plaintiffs 1 and 3, and in the nature of things they could not be expected to say anything about the circumstances under which the accident took place, as they were not expected to be at the spot and as a matter of fact they were not at the spot at the time of the accident. The question as to whether the plaintiffs have discharged the burden has to be examined on a conspectus of the entire circumstances appearing from the evidence. It is the common case of all the parties that the work that was being executed by the first defendant at the time of the accident was erection of trusses, that the number of trusses to be erected was 13 and that all the 13 trusses were temporarily fixed before they were to be permanently erected. It is also the common case of all the parties that derricks were used in connection with the errection. It is also the common case of all the parties that all the 13 trusses fell down and one of them fell on Lachi Raju. It is not the defence of the first defendant that in the process of fixing the trusses permanently, some trusses are likely to fall down and that, therefore, the falling of trusses on Lachi Raju was not due to negligence. The admissions of D.W. 1 in this connection have to be noted. He is unable to say how the accident took place. He is not a qualified Engineer. He claims to be only an experienced, contractor. Whenever a truss is hoisted a derrick would be used. A derrick would be supported by a number of ropes on all sides. The derrick would be shifted from place to place for hoisting trusses. After the accident, D.W. 1 saw the place and found the derrick having fallen down over the trusses. Even if one of the trusses falls, all the others will fall. Before the trusses are permanently fixed, they would be temporarily fixed with bellies (meaning wooden poles). Normally two or three or four purlins would be tied temporarily by means of bellies before they are fixed with steel pu lins. Strong purlins would be used to permanently fix the trusses. In addition to the foregoing admissions, the further admission of D.W. 1 was that in the instant case the 13 trusses were not fixed with bellies. He is unable to say the number of trusses fixed with bellies as he admittedly was not supervising the work. His further significant admission is that he cannot say definitely the exact work which was being carried on at the time of the accident. According to his admissions, the trusses should be fixed with bellies before they are permanently fixed. Admittedly, all the 13 trusses, which fell down were not fixed with bellies. D.W. 1 offered no explanation for this serious omission. All that emerges from his evidence is that he knows nothing about the cause of the accident and that the fact remains that all the 13 trusses fell down.

The question in these circumstances, is whether it is reasonable to infer that the plaintiffs have made out a *prima facie* case of negligence on the part of the first defendant. As the falling of trusses is not, according to the first defendant, a common inevitable feature in the process of permanent fixing up and as all the 13 trusses had admittedly fallen down, there arises a presumption that the falling was due to negligence. Asquith, L.J. in *Barkway* v. *South Wales Transport Company*[1], summarised the principle applicable as to onus of proof in the following short propositions :

> "(*i*) If the defendant's omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur* there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption.
>
> (*ii*) It is no rebuttal for the defendants to show, again without more that the

1. (1948) 2 All E.R. 460, 471.

immediate cause of the omnibus leaving the road is a tyre-burst since a tyre-burst is *per se* a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Lauris* v. *Raglan Building Company*[1]. where not a tyre-burst but a skid was involved. (*iii*) To displace the presumption the defendants must go further and prove (or it must emerge from the evidence as a whole) either (*a*) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (*b*) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres".

The same principles have been restated in Halsbury's Laws of England, Volume 23, at page 671, paragraph 956, thus:

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in this defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore, there is a duty on the defendants to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care, no risk would in the ordinary course of events ensure, the burden is in the first instance on the defendant to disprove the liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable and this inference is strengthened if the injurious agency is inanimate".

9. The foregoing principles directly apply to the present case. The falling of all the 13 trusses tells its own story of negligence. Mr. Gopalaswami Ayyangar, Counsel for the first defendant-appellant, contended that the principle of *res ipsa loquitur* is only a rule of evidence and that it cannot be extended to hold that where the burden initially lies upon the plaintiffs, it would displace that burden and shift the burden to the defendants to show that the accident was not due to negligence. We are unable to accept this argument. We have already referred to the evidence of D.W. 1, which clearly shows that he knew next to nothing about the cause of the accident. As the falling of all the trusses by itself raises a presumption of negligence, the burden shifts to the first defendant to show what care was taken in hoisting the trusses and why all the 13 trusses fell down. The first defendant did not examine any Engineer or any one else, who was on the spot attending to the erection at the time of the accident, to show what precaution was taken to securely fasten the trusses, which were fixed temporarily and how the derricks were operated and under what circumstances all the 13 trusses fell down. All these matters were in the peculiar knowledge of the first defendant. It is not possible to expect the plaintiffs to let in evidence to show that any peg gave way or any stay wire snapped or any particular stay wire, which should have been put, was not put or why the trusses fell down. It is in these circumstances that the Court below rightly applied the principles of *res ipsa loquitur* and inferred that the accident was caused by the negligence on the part of the first defendant. We see no flaw in this conclusion.

10. The next argument of Mr. Gopalaswamy Ayyangar, Counsel for the appel-

1. I.L.R. (1942) 1 K.B. 152.

lant, was that the Court below erred in awarding a sum of Rs. 5,000 as loss to the estate. We must at this stage observe that Mr. Gopalaswami Ayyangar, did not advance any argument on the assessment of the sum of Rs. 29,000, which has been awarded to plaintiffs 3, 4 and 5. His only argument was with regard to the award of Rs. 5,000 as loss to the estate. Before we examine this argument, it is necessary to set out the relevant provisions of the Act.

"1-A. *Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong*:—Whenever the death of a person shall be caused by wrongful act, neglect or default and the act, nelgect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shal have been so caused and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, or any of them in such shares as the Court by its judgment or decree shall direct.

2. *Not more than one suit to be brought.*—Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint;

Claim for loss to estate may be added:—Provided that in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for, and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased."

The mode of assessment of damages under these provisions is not free from doubt. It is beset with certain difficulties and it depends on many imponderables. Section 1-A which was formerly section 1, is in substance a reproduction of the English Fatal Accidents Acts, 9 and 10 Vict. Ch. 93 known as the Lord Campbell's Acts. Section 2 corresponds to a provision enacted in England by the Law Reforms (Miscellaneous Provisions) Act, 1934. The English Courts have formulated certain basis for calculating damages under Lord Campbell's Acts.

The principles on which damages under sections 1-A and 2 of the Act have to be assessed have been settled by the Supreme Court in *Gobald Motor Service Ltd.* v. *R.M. K. Veluswami*[1],. Subba Rao, J.. (as he then was) speaking for the Court, observed at page 7:

"The principle in its application to the Indian Act has been clearly and succinctly stated by a Division Bench of the Lahore High Court in *Secretary of State* v. *Gokal Chand*[2], In that case, Sir Shadi Lal, C.J., observed at page 453 thus:

"The law contemplated two sorts of damages; the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate, but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate.".

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1. (1962) 1 An.W.R. (S.C.) 105 : (1962) 1 M.L.J. (S.C.) 105 : (1962) 1 S.C.J. 206 : (1962) M.L.J. (Crl.) 120 : (1962) 1 S.C.R. 929 : A.I.R. 1962 S.C. 1.
2. (1925) I.L.R. 6 Lah. 451.

The learned Judge clarified the position by giving the following Illustration also:

"An illustration may clarify the position. *X* is the income of the estate of the deceased, *Y* is the yearly expenditure incurred by him on his dependants (we will ignore the other expenditure incurred by him): *X-Y* i.e., *Z*, is the amount he saves every year. The capitalised value of the income spent on the dependants, subject to relevant deductions, is the pecuniary loss sustained by the members of his family through his death. The capitalised value of his income, subject to relevant deductions, would be the loss caused to the estate by his death. If the claimants under both the heads are the same, and if they get compensation for the entire loss caused to the estate, they cannot claim again under the head of personal loss the capitalised income that might have been spent on them if the deceased were alive. Conversely, if they got compensation under section 1 representing the amount that the deceased would have spent on them, if alive, to that extent there should be deduction in their claim under section 2 of the Act in respect of compensation for the loss caused to the estate. To put it differently, if under section 1 they got capitalised value of *Z*, for the capitalised value of *Y* plus *Z i.e.*, *X* would be the capitalised value of his entire income."

On a review of the English authorities, the learned Judge observed that the cause of action under section 1 and that under section 2 are different that while under section 1 damages are recoverable for the benefit of the persons mentioned therein, under section 2 compensation goes to the benefit of the estate; whereas under section 1 damages are payable in respect of loss sustained by the persons mentioned therein, under section 2 damages can be claimed *inter alia* for loss of expectation of life. Summarising the position, the learned Judge observed:

"The rights of action under sections 1 and 2 of the Act are quite distinct and independent. If a person taking benefit under both the sections is the same, he cannot be permitted to recover twice over for the same loss. In awarding damages under both the heads, there shall not be duplication of the same claim, that is, if any part of the compensation representing the loss to the estate goes into the calculation of the personal loss under section 1 of the Act, that portion shall be excluded in giving compensation under section 2 and *vice versa*."

In that case compensation under section 1, which was the old section, was fixed by taking into consideration *inter alia* the reasonable provision the deceased, if alive, would have made for the dependants. Under section 2 the Courts below had awarded damages for loss to the estate in a sum of Rs. 5,000 which figure represented the damages for the mental agony, suffering and loss of expectation of life. The Supreme Court held that there was no duplication in awarding damages under both the heads.

12. The question has been again examined by the Supreme Court in *C.K.S. Iyer* v. *T.K. Nair*[1], Hegde, J., speaking for the Court, after referring to certain English cases and to the decision in *Gobald Motor Service Ltd.* v. *R.M.K. Veluswami*[2], held at page 380:

"The law on the point arising for decision may be summed up thus: Compulsory damages under section 1-A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under section 2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are

1. (1970) 2 S.C.J. 381 : (1970) M.L.J. (Crl.) 691 : (1970) 2 S.C.R. 688 : A.I.R. 1970 S.C. 376.
2. (1962) 1 S.C.J. 206 : (1962) M.L.J. (Crl.) 120 : (1962) 1 S.C.R. 929 : (1962) 1 An.W.R. (S.C.) 105 : (1962) 1 M.L.J. (S.C.) 105 : A.I.R. 1962 S.C. 1.

necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority. In the matter of ascertainment of damages, the appellate Court should be slow in disturbing the findings reached by the Courts below, if they have taken all the relevent facts into consideration."

13. In the light of the foregoing principles, it has to be examined whether the Court below was right in awarding Rs. 5,000 as loss to the estate under section 2. In other words, the question is whether there is any duplication of the same claim under sections 1-A and 2. The Court below estimated the annual gross income of the deceased at the time of his death at Rs. 4,860. At the time of his death the deceased was 30 years old. On these aspects there is no controversy. The Court below found on the evidence that the third plaintiff, the widow, would have had the benefit Rs. 1,800 per annum out of the salary of the deceased. The Court below took it that the deceased would have lived for another 30 years and on that basis observed that the third plaintiff would have received from the deceased benefit of about Rs. 54,000. But the Court did not award this sum. A contention appears to have been raised on behalf of the first defendant to the effect that the deceased had insured his life for Rs. 20,000 and that the benefit of the policy was to go to the third plaintiff and that amount should also be deducted. The Court below took note of that fact and held that even if the total benefit due to the third plaintiff was taxed down at 30 per cent and a further deduction of Rs. 20,000 (insurance amount) was made, still what the third plaintiff claimed, namely, Rs. 10,000 was just and proper. So far as plaintiffs 4 and 5 are concerned, the Court below took their ages into consideration and the period during which they would normally receive help from the deceased and on that basis calculated the benefit which they had lost. Our attention has not been drawn to any circumstance to hold that the said basis is in any way erroneous. Under section 2 damages can be claimed *inter alia* for loss of expectation of life. The only restriction as laid down by the decisions of the Supreme Court is that same persons should not claim damages under both the heads. As we have pointed out already, the learned Judge has rejected the claim of plaintiffs 1 and 2, namely, the parents of the deceased on the ground that they were not dependants and that they were not entitled to get any damages under head No. 1. However, with regard to the loss to the estate, the mother, namely, the second plaintiff is an heir under the Hindu Succession Act, 1956, and consequently, she will be getting the benefit only under the second head *i.e.*, under section 2 and not with reference to damages under section 1-A. Having regard to these circumstances, we do not think that the Court below was wrong in fixing the sum of Rs. 5,000 as damages under section 2, though it has to be admitted that this amount has been arrived at as a result of surmise and conjecture which are inevitable in the circumstances; nor do we find any ground to accept the contention of plaintiffs 3, 4 and 5 that the Court below should have awarded more under this head.

14. In the result, the appeal fails and is dismissed with costs. The Memorandum of cross-objections is dismissed, but in the circumstances, without costs.

P.S.P. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. S. Venkataraman and S. Maharajan, JJ.*

Hazarimal K. Shah, Sole Proprietor of J. Hazarimal & Co. (deceased) **by his L.Rs.** .. *Appellants**

v.

The Trustees of the Port Trust of Madras, Madras .. *Respondents.*

Madras Port Trust Act (II of 1905), sections 52, 56 and 58—Sea Customs Act (VIII of 1878), section 85—Suit for damages—Import of Electric Bulbs—Goods not cleared within two months of arrival—Sale to realise dues of the Port Trust and customs duty on the goods—Sale whether valid.

The provisions of the Madras Port Trust Act (sections 52, 56, and 58) read with the last portion of section 85 of the Sea Customs Act clearly show that the Port Trust has power to sell such goods as are necessary to realise the amount due to it and also the custom duty. [*Para.* 13.]

There is, however, no provision in the Sea Customs Act, or in the Port Trust Act entitling the importer to pay proportionate customs duty on part of the goods and get permission to release those particular goods on payment of the proportionate duty. [*Para.* 15.]

On the contention that the Port Trust can sell only so much of the goods as may be necessary, but not the entirety of the goods under section 56.

Held, the words used in the Madras Port Trust Act (section 56) "to sell by public auction so much as may be necessary of such goods" are themselves sufficient to clothe the Port Trust with authority to sell the whole of the goods. [*Para.* 16]

Case referred to :

Attorney-General for Ceylon v. *A. D'Silva*, (1953) A.C. 461.

Appeal under clause 15 of the Letters Patent and section 96 of the Civil Procedure Code, from the Judgment and Decree of the Honourable Mr. Justice Sadasivam dated 4th September, 1964 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C.S. No. 52 of 1958.

D. Trilokchand Chopda, for Appellant.

R. G. Rajan and *D. V. Sivagnanam,* for Respondents.

The Judgment of the Court was delivered by

Venkataraman, J.—The plaintiffs whose suit has been dismissed by Sadasivam, J., on the Original Side, are the appellants before us. They imported 100 cases of Electric Bulbs from abroad by a steamer which arrived at the Madras Port on 13th January, 1957. They did not file any "import application" before the Port Trust as contemplated under Instruction 7 of the Madras Port Trust Manual, for clearing the goods. They filed a bill of entry (Exhibit P-6) on 19th March, 1957 before the customs authorities. The bill of entry was returned for answering certain queries and it was re-presented on 31st July, 1957. It was again returned but it was not re-presented.

2. In the meantime, since no one had taken any steps to clear the goods from the Port Trust within two months of the arrival, the Port Trust began to exercise its power of sale under section 56 of the Madras Port Trust Act to realise the dues to the Port Trust. Section 56 says:

> "It shall be competent for the Board, at the expiry of two months from the time when any goods have passed into its custody, or in the case of perishable goods at the expiry of such shorter period not being less than 24 hours as the Board shall think fit, to sell by public auction so much as may be necessary of such goods, (*a*) if any rates payable to the Board in respect of such goods have not been paid.."

The dues to the Port Trust amounted to Rs. 3,476-25 and in addition to this amount, the Port Trust had to pay customs duty on the goods, for, otherwise, under section 88 of the Sea Customs Act, 1878, which was in force, the goods could not be removed from the Port Trust premises by the purchaser thereof

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* O.S.A. No. 29 of 1965. *27th March*, 1973.

at any auction which might be held by the Port Trust. This is the crucial question in the case and we shall deal with it in greater detail in due course.

3. Accordingly the Port Trust made an application to the Collector of Customs to determine the amount of customs duty payable. They were informed that the customs duty was Rs. 60,000. The sale was held by public auction on 24th October, 1957 for realising not merely the sum of Rs. 3,476-25, but also the amount of Rs. 60,000. It was felt necessary to sell all the 100 cases for this purpose. Actually the sale fetched only a sum of Rs. 80,000. After appropriating the sums of Rs. 60,000 due to the Collector of Customs and Rs. 3,476-25 to the Port Trust, the balance or a substantial portion thereof was paid to the plaintiffs in due course.

4. The plaintiffs filed the suit claiming damages of Rs. 1,50,000 contending that the said sale was illegal and that they had been damnified, because the goods, if sold in open market, would have fetched much more.

5. The learned Judge held that the sale was valid, that the plaintiffs were not entitled to any damages and that, if they were to be held entitled to any damages, the quantum could only be Rs. 20,000. Aggrieved by this judgment the plaintiffs have preferred this appeal.

6. The two main points which Mr. Trilokchand Chopda, the learned Counsel for the appellants, has urged before us are these. The first is that the Port Trust could not sell the goods for paying off the customs duty. It had authority only to sell such portion of the goods as was necessary for recovering the dues of the Port Trust itself. That was only a sum of Rs. 3,476-25 and the sale of a few cases would have been sufficient for the purpose. Secondly, even assuming that the Port Trust could sell anything more for realising the sum of Rs. 3,476-25 and also the sum of Rs. 60,000 the notices prescribed under the Port Trust Act had not been issued and therefore the sale was vitiated.

7. A third minor point was advanced, namely, that it was only on 24th October, 1957, that intimation was given to the Port Trust that the customs duty had been fixed at Rs. 60,000 and that, according to the learned Counsel, a further notice should have been given to the plaintiff from that moment giving him ten days' time to pay the amount.

8. In our opinion, none of these contentions is valid. We shall deal with them seriatim. On the first point it is necessary to refer to the relevant provisions of the Madras Port Trust Act and, to some extent, to the provisions of the Sea Customs Act, 1878. Section 51 of the Madras Port Trust Act gives a lien to the Port Trust in respect of the amounts due to it under the Act.

9. Section 52 is important and says:

"Such lien shall have priority over all other liens and claims, except for general average and for the ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in section 53, and for primage and for money payable to the Government."

It will be noted that the customs duty payable under the provisions of sections 20 and 87 of the Sea Customs Act, 1878, is money payable to the Government and that will have priority over the lien of the Port Trust.

10. Then follows section 58 the relevant portion of which we have already quoted. Then comes section 59 which is very important and says:

(1) The proceeds of every sale under section 56 or section 58-A shall be applied as follows:

(a) in payment of the expenses of the sale;

(b) in payment, according to their respective priorities, of the liens and claims excepted in section 52 from the priority of the lien of the Board;

(c) in payment of the rates and expenses of landing, removing, storing or warehousing the same, and of all other charges due to the Board is respect thereof.

(2) The surplus, if any, shall be paid to the importer, owner or consignee of the goods, or to his agents, on his applying for the same:........

11. Section 20 of the Sea Customs Act enacts that customs duty shall be levied at the rates prescribed. Section 85 enables the Collector of Customs to permit the steamer agent to discharge the cargo at the Port Trust. Then there comes this provision :

> A public body or company at whose landing place or wharf any goods are discharged under clause (*b*) of this section shall not permit the same to be removed without an order in writing from the Customs Collector.

Section 86 requires the owner of the goods to file the bill of entry in order to enable the Collector of Customs to determine the amount of duty payable. Section 87 speaks of the assessment of the duty by the Customs Collector and says:

> On the delivery of such bill the duty (if any) leviable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home consumption, or warehouse them, subject to the provisions hereinafter contained.

Section 88 enables the Collector of Customs to sell the goods if the goods are not entered and cleared for home consumption or warehoused within four months from the date of entry of the vessel.

12. It is clear from the provisions of the Sea Customs Act which we have quoted above that, once the duty is ascertained, the owner of the goods has to pay it. In this case the duty was ascertained to be Rs. 60,000 and that was intimated to the Port Trust on 24th October, 1957 before the sale took place. But even before that, well in advance, the Port Trust had made an application to the Collector of Customs to make the assessment and intimation thereof was given to the plaintiff's clearing agent, A.V. Kanniah Naidu. We shall refer to the exhibits presently. Section 52 of the Port Trust Act gives priority to the Collector of Customs in respect of customs duty, even over the dues payable to the Port Trust for which it has got a lien. Section 56 permits the Port Trust to sell such portion of the goods as may be necessary. Section 59 says that the proceeds of such sale shall first be utilised for payment of the expenses of the sale, then for the payment of the customs duty and only thereafter the Port Trust can take its own dues. The purchaser of the goods at the public auction which might be held by the Port Trust must surely be permitted to remove the goods. Otherwise nobody would be willing to purchase the goods. The last portion of section 85 of the Sea Customs Act which we have quoted shows that the goods cannot be removed without an order in writing from the Customs Collector, and the Customs Collector will permit the removal only if the customs duty has been paid. That this is the procedure in actual practice, apart from what appears from the statutory provisions quoted above, is clear from the evidence of D.W. 1, the Docks Manager in the Port Trust, as also from Exhibit D-24, the Madras Port Trust Manual. Though there is no provision in the Madras Port Trust Act that the Port Trust can sell a portion necessary for realising its dues as well as customs duty, it is necessarily implied in the provisions which we have quoted that the Port Trust has such a power. The provisions which we have quoted above clearly show that the Port Trust can sell the goods necessary to realise not merely the dues payable to the Port Trust but also the customs duty, and that out of the proceeds of such sale the customs duty has to be paid first and only thereafter the dues of the Port Trust can be realised. As we have already pointed out, it is only after the payment of the customs duty the goods will be released by the customs authorities and the purchaser can take delivery thereof. If it were not permissible to include the customs duty in estimating the goods to be sold under section 56, there would be a stalemate and there would be no means at all of the Port Trust realising its due. The power of sale of the Port Trust will become illusory unless the Port Trust has power to do every thing incidentally necessary for carrying out this power of sale under section 56 of the Act, and the one thing incidentally necessary was the sale of the goods for the purpose of paying the customs dues as well without payment of which the purpose of the sale would be frustrated.

13. Thus, the provisions of the Madras Port Trust Act read with the last portion of section 85 of the Sea Customs Act clearly show that the Port Trust has power to sell such goods as are necessary to realise the amount due to it and also the customs duty. We may add that this position is reinforced by the circumstance that there is no corresponding provision in section 88 of the Sea Customs Act enabling the Port Trust to apply to the Customs Collector for payment of the amount due to the Port Trust in case the sale is to be held by the Collector of Customs under section 8, for realization of the customs duty.

14. The learned Counsel for the appellant who argued the appeal with great ability and put forth all possible contentions, advanced a very ingenious argument that even assuming that the Port Trust had a power of sale, it did not have the power to sell all the 100 cases. The argument can be illustrated thus: There were 100 cases in this case. Assume for the present that the sum of Rs. 80,000 which the public auction sale fetched was a fair price; that is to say, one case would fetch Rs. 800. The Port Trust was entitled to realise only Rs. 3,476-25 for itself. It would have been sufficient to sell 20 cases to realise the said sum of Rs. 3,476-25 and also the proportionate duty of Rs. 12,000 on the 29 cases. The argument of the learned Counsel is that it would have been sufficient for the Port Trust to sell 20 cases to realise its dues and the proportionate customs duty thereon and also enable the purchaser to clear the 20 cases. The substance of argument is that it was not permissible to sell anything more than 20 cases.

15. This argument is untenable. It assumes that the Collector of Customs should be prepared, and would be prepared, to release those 20 cases alone on payment of an assumed proportionate customs duty in respect thereof. There is, however, no provision in the Sea Customs Act or in the Port Trust Act entitling the importer to pay such proportionate customs duty on part of the goods and get his permission to release those particular goods on payment of the proportionate duty. But, so long as they did not approach the Collector of Customs and get any such permission, the only duty payable was the consolidated duty of Rs. 60,000 on the entire consignment of 100 cases, and, hence, the Port Trust was entitled to sell such goods as, in its opinion, w s necessary to realise the sum of Rs. 3,476-25 and the sum of Rs. 60,000.

16. The next contention of the learned Counsel for the appellants is that section 56, Port Trust Act, permits the Port Trust to sell so much of the goods as may be necessary, but not the entirety of the goods. The learned Counsel says that the provisions of the Madras Port Trust Act are, in this respect, different from the provisions of section 64 of the Bombay Port Trust Act, 1879, or section 118 of the Calcutta Port Trust Act, 1880, which permit the Bombay Port Trust or the Calcutta Port Trust, as the case may be, to sell such goods or so much as would be necessary to satisfy the amount directed to be paid out of the proceeds of such sale. The learned Counsel submits that the Bombay and Calcutta Acts permit sale of the whole or a part of the goods and that the Madras Act permits only the sale of part of the goods, and not of the whole. This argument, again, cannot be accepted, because, the words used in the Madras Port Trust Act (section 56) "to sell by public auction so much as may be necessary of such goods" are themselves sufficient to clothe the Port Trust with authority to sell the whole of the goods, if it thought it necessary for realizing the sum of Rs. 3,476-25 and the amount of Rs. 60,000. It should be noted that no plea has been taken in the plaint, though it contains several grounds of attack of the sale that the Port Trust was guilty of *mala fides* in selling the 100 cases and that it *bona fide* knew that a sale of less was sufficient, for example that it might have been sufficient to sell 80 of the 100 cases to realise the said sum of Rs. 3,476-25 and the sum of Rs. 60,000. When the Port Trust put up for sale the 100 cases, it was not likely to know what amount they would fetch if sold and we have no doubt that the Port Trust *bona fide* thought that it would be necessary to sell all the 100 cases in one lot.

17. The first main contention of the learned Counsel that the Port Trust had no power to sell the 100 cases fails.

18. The second contention is that no valid notice, as contemplated by sections

57 and 58 of the Port Trust Act, had been issued. Before dealing with this contention, reference may be made to a few exhibits. In Exhibit D-1, dated 16th March, 1957. Binny and Company, the steamer agents, informed the Port Trust that this particular consignment of 100 cases might be delivered to A. V. Kanniah Naidu. In Exhibit D-4 dated 14th July, 1957 the Port Trust addressed the following communication to the steamer agent, Binny and Company.

> "I have the honour to inform you that application is being made to the Collector of Customs for the clearance of the goods noted overleaf for sale under section 56 of the Madras Port Trust Act, II of 1905".

This mentioned 99 cases. Thereupon, Binny and Company wrote Exhibit D-5 dated 17th July, 1957 to A. V. Kanniah Naidu as follows and sent a copy thereof to the Port Trust:

> "We have now been advised by the Traffic Manager, Madras Port Trust, that application is being made to the Collector of Customs for the clearance of the above cases for sale under section 56 of the Madras Port Trust Act, II of 1905.
>
> . . .
>
> We suggest that, if you intend clearing the cases you request the Traffic Manager, Madras Port Trust, to withhold them from sale. Kindly note that neither the carrier, nor ourselves as agent will accept any responsibility in the event of this cargo being sold in public auction by the Madras Port Trust".

The Madras Port Trust in Exhibit P-7 dated 9th August, 1957 wrote to Kanniah Naidu as follows:

> "I have the honour to inform you, as required under section 58 of the Madras Port Trust Act, II of 1905, that the goods shown on the reverse, will be sold by auction, if the Port Trust charges recoverable thereon have not been paid and the goods not cleared within 10 days from the date of this notice".

Thereupon A. V. Kanniah Naidu gave the following reply (Exhibit P-8) dated 17th August, 1957 to the Port Trust.

> "The above consignment will be passed within one month. Duty and harbour dues etc., will be paid and goods cleared. As such it is requested that the auction sale may kindly be cancelled".

19. It appears that the Port Trust was however, anxious to proceed with the sale, if the Customs authorities would give clearance. The sale was originally fixed on 29th August, 1957, but the Customs did not give clearance and so the sale was postponed to 24th October, 1957. In Exhibit P-9 dated 30th August, 1957 the Port Trust wrote to the steamer agent as follows:—

> "I have the honour to inform you that application is being made to the Collector of Customs for the clearance of the goods noted overleaf for sale under section 56 of the Madras Port Trust Act, II of 1905".

This was in respect of one case.

20. Exhibit D-15 is a communication dated 14th October, 1957 by Binny and Company to A. V. Kanniah Naidu. It is important and says:

> "We have been advised by the Traffic Manager, Madras Port Trust, that the above cases will be sold in public auction to be held on 24th October, 1957 at the Trust premises.
>
> We suggest that, if you intend clearing the cases, you request the Traffic Manager, Madras Port Trust, to withhold them from sale. Kindly note that neither the carrier nor ourselves as agents will accept any responsibility in the event of this cargo being sold in public auction by the Madras Port Trust".

21. There was thus factual notice by Binny and Company to A. V. Kanniah Naidu that the goods would be sold on 24th October, 1957 at the premises of the Port Trust. Exhibit P-7 also gives a clear notice saying that the auction would

be held at 2 P.M. on 24th October, 1957, at the Port Trust premises, and this item finds place as item 109 at page 14 of the Gazette notification.

22. Exhibit P-22 is a communication dated 25th October, 1957 from the plaintiffs to the Madras Port Trust. It shows that the plaintiff was aware of the sale which took place on 24th October, 1957 and requested the Port Trust to stop the delivery. The first plaintiff died and his brother gave evidence. His evidence shows that the first plaintiff told A. V. Kanniah Naidu that the Port Trust were going to auction the goods and asked him to write a letter to the Harbour authorities stating that they would pay the money and take delivery of the goods and requesting them not to proceed with the sale. It is amply clear from the evidence, oral and documentary that factually A. V. Kanniah Naidu and the first plaintiff had notice that the goods would be auctioned at 2 P.M. on 24th October, 1957. A. V. Kanniah Naidu himself did not go into the witness box to deny the same.

23. This being the factual position, the question of notice in law recedes into the background. Actually, there is no substance in the contention that the notice, Exhibit D-4 dated 12th July, 1957 was insufficient. The argument of the learned Counsel is that Exhibit D-4 did not specify the amount due to the Port Trust, but that is really immaterial. The plaintiffs or Kanniah Naidu could have easily ascertained the amount due to the Port Trust by asking them. Section 57 of the Port Trust Act says that before making such sale ten days' notice of the same shall be given by publication thereof in the Official Gazette. Section 58 says:

> "If the address of the owner of the goods has been stated on the manifest of the cargo or in any of the documents which have come into the hands of the Board, or is otherwise known, notice shall also be given to the owner of the goods by letter delivered at such address or sent by post".

Now it is clear that, apart from the name of A. V. Kanniah Naidu the name of the first plaintiff was not made known to the Port Trust or stated in any of the documents which came into the hands of the Port Trust. So far as A. V. Kanniah Naidu was concerned, the Port Trust gave the notice, Exhibit P-7 dated 9th August, 1957. Further the steamer agent gave the notice, Exhibit D-15, to Kanniah Naidu. Kanniah Naidu himself wrote a letter Exhibit P-8 to the Port Trust, which clearly shows that he knew that the goods would be sold by public auction if the dues to the Port Trust were not paid, and he offered to pay the same within one month. However, he did not keep his promise. It is, therefore, clear that there was sufficient, and, in fact, legal compliance with the provisions of the statute and the sale cannot be held to be invalid at law. Though it is not necessary for our purpose to find out why the plaintiffs did not clear the goods by paying the harbour dues and the customs duty, it is not improbable that they did not have the money. The learned Judge has referred to this aspect and observed that no positive evidence was forthcoming on the side of the plaintiffs that they had the money ready to pay the customs duty of Rs. 60,000.

24. The last point that remains is that the intimation of the customs duty having been fixed at Rs. 60,000 was given to the Port Trust only on 24th October, 1957 and that a further notice should have been given to the plaintiffs giving them ten days' time. We do not agree. Exhibit P-7 itself clearly put the plaintiffs and A. V. Kanniah Naidu on guard that, if they did not pay the harbour dues and the customs duty, the goods would be brought to sale. It was upto the plaintiffs and A. V. Kanniah Naidu to thank themselves if they did not ascertain the customs duty from the Customs Authorities and did not pay it within time.

25. The learned Counsel for the appellant cited the decision of the Privy Council in *Attorney-General for Ceylon* v. *A. D'Silva*[1]. We do not think that the case has any relevancy at all. In that case the Principal Collector of Customs sold some properties on the

1. 1953 A.C. 461.

ground that he was empowered to collect the amount due to the Customs. Actually it was property belonging to the Crown and no amount was legally payable from the Crown to itself. That was the basis of the decision and it is not applicable to the facts of this case, where customs duty was payable by the plaintiffs to the Customs.

26. In the result the appeal is dismissed with half costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT.—*V. Ramaswami, J.*

B. M. Kuppuswami Mudaliar, Partner, Venus Talkies, Korukkupet, Kancheepuram Taluk, Chingleput District .. *Petitioner**

v

The Collector of Chingleput, Kancheepuram and others .. *Respondents.*

Tamil Nadu Cinemas (Regulation Rules as amended in 1968), *rule* 103 (2) (*iii*)—*Scope—Travelling Cinema—Location—Grant of no objection certificate—Proximity of burning and burial ground—Not a fire hazard—No violation of rule* 103 (2) (*iii*) —*Constitution of India* (1950), *Article* 226.

The object of Rule 103 (2) (*iii*) of the Tamil Nadu Cinemas (Regulation) Rules is to prevent any fire hazard and the Rule should be interpreted with reference to this object. The emphasis is on the use of fire for ignition, processing etc., and sparks escaping through chimneys or any other outlet. It is not every site where fire is used for ignition that is prohibited under the Rule. A burning ground is not covered by this Rule.

[*Para* 2.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the second respondent herein, dated 22nd March, 1973 and made in B. R. Rt. No. 1413 (L), confirming the order of the first respondent herein, dated 10th January, 1973 and made in D. Dis. No. 7814/M/72, and quash the order.

P. Chidambaram, for Petitioner.

The Court made the following

ORDER.—This is a writ petition praying for the issue of a writ of *certiorari* or any other appropriate order, calling for the records relating to the order of the second respondent dated 22nd March, 1973 made in B.P.Rt. No. 1413 (L), confirming the order of the first respondent, *viz.*, the Collector of Chingleput, dated 10th January, 1973 and quash the same.

2. Under the impugned order, the Board of Revenue confirmed the grant of no-objection-certificate to the third respondent for locating a touring cinema, in the site chosen by the third respondent. The no-objection-certificate was granted originally by the Collector on 14th August, 1972. There was an appeal against that order to the Board of Revenue. By order dated 21st October, 1972, while holding that the touring cinema was not within the prohibited distance of one mile from the petitioner's permanent theatre, the Board set aside the order of the Collector and remanded the matter for a fresh disposal after considering the objections of the petitioner in regard to the adequacy. Even after remand, the first respondent came to the conclusion that the population in that area and the other circumstances justified another touring cinema and accordingly granted the no-objection-certificate again. The petitioner again put forward an appeal to the Board of Revenue. The Board, by its order dated 22nd March, 1973, has confirmed the grant of no-objection-certificate to the third respondent. In this writ petition, the learned Counsel for the petitioner contended that the grant of a no-objection-certificate to the third respondent would violate rule 103 (2) (*iii*) of the Tamil Nadu Cinemas

* W.P. No. 2571 of 1973. 17*th April*, 1973.

(Regulation) Rules, as amended by G.O. Ms. No. 3218, Home, dated 30th October, 1968. That rule reads as follows:

"When the building in which the travelling cinema is located is thatched with inflammable materials, there shall be a minimum distance of

(i) * * * *

(ii) * * * *

(iii) O. 201 kilometre from a temple or maidan where fire-works are displayed on festivals and special occasions or factories, workshops, mills etc. where fire is used for ignition, processing etc. and sparks escape through chimney or any other outlet".

The contention of the learned Counsel for the petitioner is that there is a burial ground within the distance referred to in this rule, where burning of corpses also is done. On this ground, it was contended that the no-objection-certificate could not be issued. The object of the rule, in my view, is to prevent any fire hazard. The rule will have to be interpreted and understood with reference to this object. The emphasis on the use of fire for ignition, processing etc., and spark escaping through chimneys or any other outlet. The use of the conjunction 'and' is significant. It is not every site where fire is used for ignation that is prohibited under the Rule. For that matter, even in houses fire is used for various purposes. Reading this condition of spark escaping through chimneys along with the specified sites and factories referred to earlier, I am of the view that a burning ground is not covered under the provisions of this rule. It is also seen that the Collector has found that the burial ground is far away in the middle of the river course, at least seven feet below the proposed site that there is a flood bank in between and that it is only very occasionally used for burning. The Board and the Collector considered that the burial or burning ground does not pose any fire hazard to the proposed tourning cinema. I am, therefore, unable to accept the contention of the learned Counsel for the petitioner that there is a violation of rule 103 (2) (iii) of the Cinema (Regulation) Rules.

3. It was next contended by the learned Counsel that in spite of the Board directing the Collector to consider the need of the area for an additional touring cinema, the Collector had not given due weight to the fact that the petitioner was not receiving sufficient income from his permanent theatre. After the remand, the Collector had found that for fairly a large distance of 15 kilometres in length and 6 kilometres in width, containing a population of 23,000 there is only the petitioner's permanent theatre and that there was enough justification for an additional touring cinema. That the petitioner was not getting sufficient income even assuming it to be true, may be for various reasons and not necessarily due to scarcity of cinema-going public in that area. The Collector had considered this point also and come to the conclusion that an additional theatre is not an extravagance. The Board had also considered this question and come to the conclusion that there was need for an additional theatre and confirmed the finding of the Collector. I do not find any ground to interfere with this finding of the Board.

4. It was then contended by the learned Counsel for the petitioner that the distance between his theatre and the proposed touring cinema is less than one mile and that violates rule 14 (2) of the Cinemas (Regulation) Rules. Before the order of remand, on the reports of the Tahsildar, the Collector found that the distance was more than one mile. That finding was confirmed by the Board in its remand order dated 21st October, 1972. After the remand, the petitioner did not challenge before the Collector that the distance between the permanent theatre and the proposed tourning cinema was less than one mile and therefore the Collector had not considered that point. It is represented by the learned Counsel for the petitioner that even after the remand, the Collector measured and since he had satisfied himself that it was more than one mile, he did not press that point before him. In the appeal before the Board, the petitioner again contended that the distance between the permanent theatre and the touring cinema is

less than one mile. The Board noted that the Tahsildar's report was that the distance was more than one mile and 108 feet and that the Collector had also measured the distance and it was found to be 1 mile 108 feet. The Board further observed that it had already accepted the finding that the distance is beyond one mile and that it was therefore not open to the appellant to canvass this ground. The petitioner had not challenged the finding of the Collector after the remand. Therefore, the order of the Collector which was the subject-matter of an appeal before the Board, could not be challenged on the ground that the distance measured less than one mile. Further, as noted in the order of the Board itself, the distance could not be measured in the way in which the petitioner wanted the distance to be measured, because there is no such pathway along that distance. In any case, this being purely a finding of fact, I am not able to interfere with the finding in proceedings under Article 226 of the Constitution.

5. No other point has been urged in this writ petition. This writ petition fails and it is dismissed.

P.S.P. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M. M. Ismail, J.*

Solomon and others .. *Appellants**

v.

Muthiah and others .. *Respondents.*

Indian Succession Act (XXXIX of 1925), section 29 (2) (1)—Intestate Succession—Suit for partition—Plaintiffs claim to be governed by the Travancore Christian Succession Regulation II of 1092—Whether correct—Existing custom or law—Whether can exclude applicability of Part V of Act XXXIX of 1925—Interpretation of statutes.

The language of section 29 (2) of the Indian Succession Act, 1925 is incapable of being interpreted as saving the existing custom or law relating to intestate succession and the exclusion of the applicability of Part V can be achieved only by a specific provision in that behalf contained in any other enactment.

[*Para.* 12.]

Courts are not at liberty to find an assumed intention which was not expressed in the statute itself. It is because of the intention not to interfere with the personal law of certain communities, that sub-section (1) of section 29 of Act (XXXIX of 1925) was enacted. The language of section 29 (2) is clear that except to the extent indicated in sub-section (1) and any other exclusion specifically provided for by any other law in force, the provisions contained in Part V were meant to be of universal application.

[*Para* 14.]

By virtue of section 6 of the Central Act III of 1951, the Travancore Christian Succession Regulation II of 1092 stood repealed with effect from 1st April, 1961. [*Para.* 16.]

Cases referred to :

Kurian Augusty v. *Devassy Aley*, A.I.R. 1957 T.C. 1; *Nabujan* v. *Paushimoni*, 54 Cal.W.R. 2 D.R. 14; *Prem Chand* v. *Lilawati*, A.I.R. 1956 Him.P. 17; *De Souza* v. *The Secretary of State for India-in-Council*, (1874) 12 Beng.L.R. 423; *Dagree* v. *Pacotti San Jao*, (1895) I.L.R. 19 Bom. 783; *Napen Bala Debi* v. *Siti Kanta Banerjee*, (1911) 15 Cal.W.N. 158; *A. M. J. Mohd. Kasim* v. *Assistant Collector, Central Excise*, (1961) 2 M.L.J. 382 : (1961) M.L.J. (Crl.) 633: A.I.R. 1962 Mad. 85.

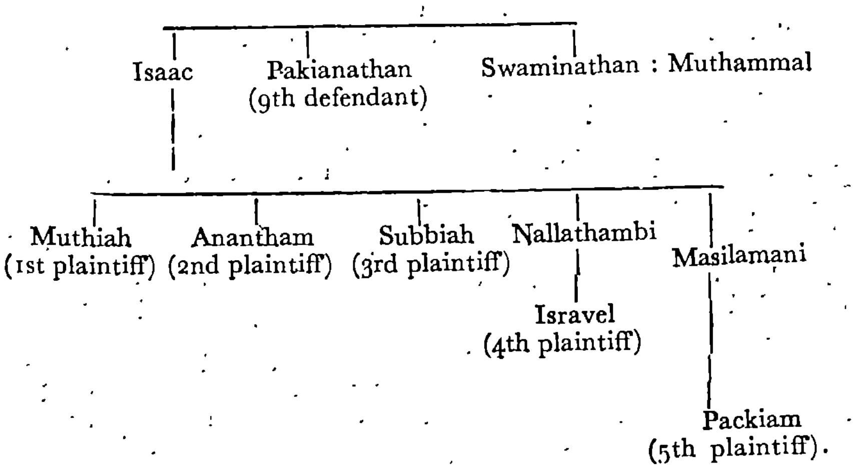
Appeal against the Decree of the District Court, Kanyakumari at Nagercoil in Appeal Suit No. 90 of 1961, preferred against the Decree of the Court of the Subordinate Judge of Nagercoil in Original Suit No. 2 of 1961.

Syamalam, for Appellant.

T. R. Srinivasan, for Respondent.

* S.A. No. 1483 of 1962.

4th November, 1970.



The Court made the following

ORDER.—The genealogical tree given above shows the relationship of the parties to Swaminathan. Admittedly, the parties are Syrian Christians who lived in that part of the former Travancore State which now forms part of the State of Tamil Nadu, after the reorganisation of the States. The said Swaminathan died issueless on 29th May, 1960, survived by his widow Muthammal. Muthammal is said to have executed two settlement deeds in favour of the appellants herein, who figured as defendants 1 to 6 in the trial Court, marked as Exhibits B-1 and B-2. She died on 16th September, 1960. The plaintiffs who are the children and grandchildren of Isaac, brother of Swaminathan, instituted O.S. No. 2 of 1961 on the file of the Court of the Subordinate Judge of Nagercoil for partition and possession of their half share in 'A' and 'B' Schedule properties and monies, contending that Swaminathan was governed by the Travancore Christian Succession Regulation II of 1092 and according to the provisions contained in that Regulation, on the death of Swaminathan, the widow Muthammal got only a life interest and on her death the properties belonged absolutely to the plaintiffs as children and grandchildren of Isaac, and Pakianathan the 9th defendant in the suit and the other brother of Swaminathan, in equal shares and the settlement deeds in favour of the appellants herein were invalid. The 7th defendant was impleaded on the ground that a certain hypothecation amount was due from him and the 8th defendant was impleaded on the ground that certain mortgage, purakkadam and hypothecation amount was due from him. The case of the appellants herein was that 'A' Schedule properties are the properties of Swaminathan, while 'B' Schedule properties did not belong to Swaminathan, but belonged to Muthammal. They also denied that Isaac and 9th defendant were brothers of Swaminathan. Their further case was that the settlement deeds were valid and Swaminathan was not governed by the Travancore Christian Succession Regulation II of 1092, but was governed by the Indian Succession Act and therefore there being no lineal descendant of Swaminathan, Muthammal was entitled to the entirety of the properties and consequently the settlement deeds were valid. The 7th defendant contended that he paid Rs. 1,000 to Swaminathan on 17th May, 1960, in respect of the 'B' Schedule item 1, that Swaminathan passed a receipt and the said receipt was missing, that before executing a release deed, as promised, Swaminathan died on 29th May, 1960, and that therefore nothing was due from him under the hypothecation bond. The case of the 8th defendant was that the mortgage and purakkadam deeds were in the name of Muthammal and only the hypothecation deed was in the name of Swaminathan, that the hypothecation amount was paid to Swaminathan on 25th May, 1960, that before executing a registered release deed, as promised, Swaminathan died all on a sudden on 29th May, 1960, and that therefore nothing was due on the

hypothecation bond. As regards the mortgage and purakkadam deeds in favour of Muthammal, his case was that he had no objection to pay the amount to the rightful claimant. The 9th defendant supported the case of the plaintiffs.

2. On these pleadings of the parties, the learned Subordinate Judge framed the necessary issues and by his judgment and decree dated 29th July, 1961, he came to the conclusion that Isaac and 9th defendant were brothers of Swaminathan, that it was the Travancore Christian Regulation II of 1092 that applied to the parties that the hypothecation amounts were due by defendants 7 and 8 and those amounts under Exhibits B-3 and B-5 are the properties of Swaminathan and that the amounts due under Exhibits B-4 and B-6 did not belong to Swaminathan, but belonged to Muthammal, and that since under the Travancore Succession Regulation II of 1092, Muthammal had only a life interest, the settlement deeds were not valid, so far as immovable properties and one half of the hypothecation amounts under Exhibits B-3 and B-5 in favour of Swaminathan were concerned. In the result, he passed a decree declaring the plaintiffs' one half right in respect of 'A' schedule properties and one half of the amounts due under Exhibits B-3 and B-5 and holding that the other half belonged to the 9th defendant. As against this judgment and decree, the appellants herein preferred an appeal to the learned District Judge of Kanyakumari at Nagercoil. The learned District Judge by his judgment and decree dated 25th June, 1962 agreed with the learned Subordinate Judge on the principal question as to whether it was the Travancore Christian Succession Regulation II of 1092 that applied or the Indian Succession Act that applied to the parties and held that on the application of the provisions of the Travancore Christian Succession Regulation II of 1092, Muthammal did not have an absolute interest in the immovable properties inherited from her husband Swaminathan, but under section 17 of the said Regulation, she was entitled to an absolute right in respect of the movables and the debts due under Exhibits B-3 and B-5 being movables, she was absolutely entitled to one half of them. Therefore, in modification of the decree of the learned Subordinate Judge, the learned District Judge granted a decree to the plaintiffs declaring their one half right in respect of 'A' schedule properties and one-fourth in the hypothecation deeds Exhibits B-3 and B-5, and holding that the other half right in 'A' schedule properties and one-fourth right in the amount due under Exhibits B-3 and B-5 belonged to the 9th defendant in the suit. The learned District Judge also provided that the mesne profits should be determined under Order 20, rule 12, Code of Civil Procedure. Hence the present second appeal by defendants 1 to 6 in the suit.

3. The principal question that arises in this case is, whether the parties were governed by the Travancore Christian Succession Regulation II of 1092 or the Indian Succession Act of 1925.

4. Mr. Syamalam, learned Counsel for the appellant, contended that by virtue of the provisions contained in the Part B States (Laws) Act, 1951 (Central Act III of 1951), which came into force on 1st April, 1951, it was the provisions of the Indian Succession Act, 1925 that applied to the succession to the property of Swaminathan which opened on his death on 29th May, 1960, and not the provisions of the Travancore Christian Succession Regulation, II of 1092. On the other hand, the Courts below relying on a decision of the Travancore-Cochin High Court in *Kurian Augusty* v. *Devassy Aley*[1], have come to the conclusion that notwithstanding the provisions contained in the Central Act III of 1951, succession to Swaminathan was governed by the provisions contained in the Travancore Christian Succession Regulation II of 1092 and not by the provisions contained in the Indian Succession Act, 1925. The question for consideration is, whether this view of the Courts below is correct, or not.

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5. It is necessary in this context to refer to the historical background of the enactment of the Indian Succession Act as well as the Travancore Christian Succession Regulation. The Indian Succession Act, 1925 is " an Act to consolidate the law applicable to intestate and testamentary succession". It has repealed :

1. The Succession (Property Protection Act XIX of 1941.

2. The Indian Succession Act X of 1865.

3. The Parsi Intestate Succession Act XXI of 1865.

4. The Hindu Wills Act XXI of 1970.

5. The Married Women's Property Act III of 1874, last paragraph of section 2.

6. The Probate and Administration Act V of 1881, Act VI of 1889, Act II of 1890 and Act VIII of 1903.

7. The District Delegates Act VI of 1801.

8. The Succession Certificate Act VII of 1899, except section 13.

9. The Native Christian Administration of Estates Act VII of 1901 and

10. The Devolution Act, 1920 (XXXVII of 1920).

The Indian Succession Act, 1925 being merely a consolidating Act, the normal rule of interpretation is that its provisions should be construed according to the state of things which existed at a time when it first became law, since the object of consolidation is to collect the existing statutory laws and make them applicable to the existing circumstances. Section 2 of the Indian Succession Act, 1865, provided :

> " Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession."

Section 331 of that Act so far as it is relevant provided :

> "The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist ; nor shall they apply to any will made, or any intestacy occurring, before the first day of January, 1866."

Section 29 of the Indian Succession Act 1925, on the basis of the interpretation of which alone, both the Travancore-Cochin High Court in the case referred to above (*Kurian Augusty* v. *Devassy Aley*)[1], and the Courts below in the present case, have come to the conclusion that it is the Travancore Christian Succession Regulation II of 1092 that applied, is as follows :

> " 29 (1) : This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.
>
> (2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy."
>
> (Originally, the expression used for the word, 'India' was 'all the Provinces', which was subsequently changed into 'States' which has been finally substituted by the word 'India', by the provisions of the Central Act III of 1951.)

Section 29 is the first section in Part V in the Indian Succession Act, 1925, which deals with intestate succession. A comparison of the above provisions in the two Acts will clearly show that sub-section (1) of section 29 of the Indian Succession Act, 1925, corresponds to section 331 of the Indian Succession Act, 1865 except to this extent, namely, that section 29 (1) of the 1925 Act is confined to cases of intestacy alone, while section 331 of the 1965 Act referred to testamentary succession also. Sub-section (2) of section 29 of the 1925 Act corresponds to section 2 of the 1865 Act except that instead of the

1. A.I.R. 1957 T.C. 1.

expression, "this Act" occurring in the latter, the expression, "in sub-section (1)" occurs in the former. The reason for this difference is obvious. Sections 2 and 331 of the 1865 Act are in general terms, while sections 29 (1) and 29 (2) of the 1925 Act apply only to intestate succession, because the 1925 Act makes different parts of the statute applicable to different circumstances and persons.

6. As I have pointed out already, section 29 is the first section in Part V in the Indian Succession Act, 1925, dealing with intestate succession, Part VI deals with testamentary succession, Section 57, which is the first section in Part VI, provides for the application of certain provisions of that part, as set out in Schedule III to the Act to a class of wills. Section 58 is significant and the same is as follows:

> "58. (1) The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jain; nor shall they apply to any will made before the first day of January, 1866.
>
> (2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India applicable to all cases of testamentary succession."

Thus, it will be seen that the provisions contained in sections 2 and 331 of the 1865 Act have been split up and incorporated in sections 29 (1) and (2) and 57 and 58 (1) and (2) of the 1925 Act, in view of the structure of the Act as well as the repeal of the Hindu Wills Act XXI of 1870.

7. It is unnecessary for me to refer to the provisions of either the 1865 Act or the 1925 Act to show that the Act dealt with the entire case of intestate and testamentary succession. On the other hand, the Travancore-Christian Succession Regulation II of 1092 was a Regulation "to consolidate and amend the Rules of law applicable to intestate succession among Indian Christians in Travancore". The objects and reasons of that Regulation were:

> "The law of intestate succession among the various sections of Indian Christians in Travancore is vague and unsettled. The High Court have been complaining about the unsatisfactory state of the law among Christians. Repeated representations were made by Christian representatives about the desirability of enacting a law of succession. The necessity for legislation has therefore long been felt.
>
> The usages of the various sections of the Christian community do not agree in all respects. Separate legislation for the various sections of Christians is neither desirable nor practicable and is likely to lead to much litigation and trouble. It is therefore thought necessary to enact a common law for all the various sections of Indian Christians.
>
> There are some Christians in the State who are Marumakkathayees. These are excluded from the operation of this Bill.
>
> The Bill is drafted on the lines of the Indian Succession Act with such alterations as are considered necessary in the interests of the various sections of Indian Christians in Travancore".

(*Vide*—The Regulations and Proclamations of Travancore—Published by permission of the Government of Travancore, 1928 Edn , Vol. IV, page 300).

Section 2 of this Regulation is as follows:

> "Except as provided in this Regulation, or by any other law for the time being in force, the rules herein contained shall constitute the law of Travancore applicable to all cases of intestate succession among the members of the Indian Christian community".

It is unnecessary to refer to the detailed provisions contained in this Regulation and it is enough to state that the provisions in this Regulation constitute a complete enactment dealing with cases of intestate succession among the members of the Indian Christian community of Travancore, as contemplated by the

preamble and as shown in section 2 of the Regulation extracted above. It will be immediately seen that section 2 of the Regulation is in *pari materia* with section 2 of the Succession Act, 1865, except that consistent with the object of the Regulation, it referred to the intestate succession only. Consequently the provisions contained in the Travancore Christian Succession Regulation II of 1092 cover exactly the same field and deal with identical subject matter, as those contained in the Succession Act, 1865, as far as intestate succession is concerned, and in Part V of the Indian Succession Act, 1925. Therefore, the conclusion is irresistible that the Travancore Christian Succession Regulation II of 1092 is a law corresponding to the provisions contained in Part V of the Indian Succession Act, 1925, so far as Christians are concerned.

8. It is against this background, the decision of the Travancore-Cochin High Court referred to already has to be examined. Before I refer to that decision itself, it is necessary to draw attention to the provisions contained in the Central Act III of 1951, on which reliance was placed before me and which was the subject-matter of discussion and decision by the Travancore-Cochin High Court.

9. The Part B States (Laws) Act, 1951 (Central Act III of 1951) was enacted for the purpose of providing for the extension of certain laws to Part B States. Immediately before first November, 1956 Part B States were: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. Section 3 of this Act states:

> "The Acts and Ordinances specified in the Schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinances shall, as from the appointed day and in so far as any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has power to make laws, be as stated in the extent clause thereof as so amended."

Section 6 is as follows :

> "If immediately before the appointed day (which was 1st April, 1951), there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed".

There are two provisos to this section and for the purpose of this case, it is unnecessary to set out those provisos. The Schedule to this Act refers to the Indian Succession Act, 1925 and substitutes the word, "India" for the expression, "the State", wherever it occurred in the Act. It also introduces a definition clause in section 2, that definition being, "India" means the territory of India excluding the State of Jammu and Kashmir. The effect of section 3 read with the Schedule to the Act so far as it is relevant for the present case was to extend the provisions contained in the Indian Succession Act, 1925 to Part B State of Travancore-Cochin and the effect of section 6 was to repeal any law in force in the State of Travancore-Cochin corresponding to the Indian Succession Act, 1925. I have already pointed out that the Travancore-Christian Succession Regulation II of 1092 is a law corresponding to Part V of the Indian Succession Act, 1925 and logically it will follow that with effect from 1st April, 1951 the Indian Succession Act, 1925, including Part V thereof came into force in the State of Travancore-Cochin and the Travancore Christian Succession Regulation II of 1092 stood repealed.

10. It is against the background of these statutory provisions and the *prima facie* effect thereof, the decision of the Travancore-Cochin High Court referred to above, namely, *Kurian Augusty* v. *Devasay Aley*[1], has to be examined. What the learned Judges in that case held was that the Travancore-Christian Succession Regulation II of 1092 would come within the expression "any other law for the time being in force" mentioned in section 29 (2) of the Indian Succession Act, 1925 and therefore it

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formed part of the Indian Succession Act itself and consequently it was not repealed by section 6 of the Central Act III of 1951. After extracting section 29 (1) and (2) of the Indian Succession Act, 1925, the learned Judges stated:

> "According to sub-section (2), Part V of the Act relating to the intestate succession will not apply to a case in which there is "any other law for the time being in force", relating to intestate succession. It follows that if the Travancore Christian Succession Act can be regarded as law in force relating to intestate succession among Christians in Travancore that law is saved under sub-section (2) of section 29, Indian Succession Act.
>
> Sub-section (1) of section 29 excludes from the operation of Part V of the Act cases in which intestacy occurred before 1st January, 1866 and intestate succession to the property of a Hindu, Mohammadan, Buddhist, Sikh or Jaina.
>
> Sub-section (2) excludes from the operation of Part V communities which have their own laws relating to intestate succession.
>
> It is clear from the section that the Indian Succession Act was not intended to interfere with the personal law of communities which have settled laws of their own as regards intestate succession. Even if Travancore formed part of the former British India, Part V, Indian Succession Act would not apply to Christians in Travancore who were governed by the Travancore Christian Succession Act".

The learned Judges then referred to a decision of the Calcutta High Court in *Nabujan* v. *Paushimoni*[1], and a decision of the Judicial Commissioner, Himachala Pradesh in *Perm Chand* v. *Lilawati*[2], holding that section 29 (2) of the Indian Succession Act, 1926 saves the existing custom. Then the learned Judges proceeded to consider the question whether with reference to the language contained in section 29 (2) of the Indian Succession Act, 1925, the Travancore Christian Succession Regulation II of 1092 must be deemed to have been adopted by reference and after quoting a passage from American Jurisprudence, Vol. 50, page 57, stated:

> "If the effect of the saving clause in section 29 (2), Indian Succession Act is to adopt all laws for the time being in force relating to intestate succession as part of the Indian Succession Act as regards intestate succession, the Travancore Christian Succession Act should be regarded as the law relating to intestate succession under the Indian Succession Act so far as Christians in Travancore are concerned.
>
> In this view of the matter, the Travancore Christian Succession Act can in no sense be regarded as law corresponding to Part V, Indian Succession Act. It has to be regarded as forming part of the Indian Succession Act. If the Travancore Christian Succession Act cannot be regarded as law corresponding to Part V, Indian Succession Act, it is clear that it will not stand repealed by section 6 of the Act III of 1951 (Central) ".

With very great respect to the learned Judges who decided that case, I am unable to agree either with their reasoning or with their conclusion. The first reasoning appears to be that section 29 (2) of the Indian Succession Act, 1925, saves all existing law or custom having the force of law relating to intestate succession. Such an effect cannot flow from section 29 (2) of the Indian Succession Act, 1925. On the other hand, the language of section 29 (2) of the said Act, in my opinion, makes it absolutely clear that the provisions contained in Part V of the Act are of universal applicability, unless that applicability has been excluded either expressly or by necessary implication by any other law for the time being in force. The expression, "save as provided in sub-section (1) or by any other law for the time being in force" occurring in sub-section (2) of section 29 of the Indian Succession Act, 1925, has to be construed in the context of the provisions contained in section 29 (1) and the principal clause in sub-section (2) itself. Section 29 (1) excludes the applicability of that Part to any intestacy occurring before the

1. 54 Cal.W.N. 2 D.R. 14.
2. A.I.R. 1956 Him. P. 17.

first day of January, 1866. It equally excludes the applicability of that Part to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina, irrespective of the date of occurrence of the intestacy. Sub-section (2) uses the expression, "save as provided in sub-section (1) or by any other law for the time being in force". The expression, "save as provided in sub-section (1)" specifically refers to the exclusion of the applicability of the provisions of Part V provided for in sub-section (1). Equally, the expression, "save as provided—by any other law for the time being in force" must necessarily refer to the exclusion of Part V made by any other law. In other words, so long as any other law for the time being in force has not provided for the exclusion of the applicability of Part V, Part V will apply. If the intention of the Legislature was to save the custom or any other law relating to intestacy, the language of section 29 (2) would have been entirely different. On the other hand, from the language of section 29 (2) and the context and setting in which it occurs, it is capable of leading only to one conclusion, namely, that the provisions of Part V are of universal application except in so far as that application has been excluded by sub-section (1) or any other law for the time being in force. The mere fact that there is a custom relating to intestate succession or there is some other law dealing with intestate succession will not lead to the exclusion of the applicability of the provisions of Part V of the Indian Succession Act, 1925. From the very nature of the case, a custom cannot exclude the applicability of the provisions of a particular statute. But a statute can do it. So long as an existing statute has not excluded the applicability of Part V of the Indian Succession Act, 1925, the provisions of the said Part V will apply. Therefore, in my opinion, there is no warrant for holding that section 29 (2) of the Indian Succession Act, 1925, saves an existing custom or existing law relating to intestacy.

11. This view of mine derives support from the observations contained in a few decisions dealing with section 2 of the Succession Act, 1965. In *De Souza* v. *The Secretary of State for India in Council*[1]. Macpherson, J., after extracting section 2 of the Indian Succession Act, 1865, observed:

> "This shows clearly that we are no longer to look to what is or was the English law, but that, subject to the exception in this section, we must look to the Act itself, and to the Act alone, for the law of British India applicable to all cases of testamentary or intestate succession. In my opinion, an enactment that the law contained in the Act shall constitute the law of the country applicable to all cases of succession, operates as a repeal of the previously existing law just as completely and effectually as if it had been expressly repealed".

12. In *Dagree* v. *Pacotti San Jao*[2], Starling, J., observed :

> " The sole point for determination in this appeal is whether the provisions of the Indian Succession Act, 1865, apply to those members of the Koli caste who profess the Christian religion, or whether it is open to them to prove that they have governed themselves, in matters of succession, by the Hindu Law or some modification thereof. The Succession Act X of 1865, section 2, provides that 'except as provided by this Act or by any other law in force, the rules therein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.' It is thus of universal application, unless the person claiming to be excepted can show that by this or some other Act he specifically is excepted from the operation of its provisions".

These two decisions were referred to and followed by a Bench of the Calcutta High Court in *Napen Bala Debi* v. *Siti Kanta Banerjee*[3]. The interpretation put in those cases on section 2 of the Indian Succession Act, 1865 is equally applicable to section 29 (2) of the Indian Succession Act, 1925. Therefore, I am of

1. (1874) 12 Beng.L.R. 423 at 427.
2. (1895) I.L.R. 19 Bom. 783 at 788.
3. (1911) 15 Cal.W.N. 158.

the opinion that the language of section 29 (2) is incapable of being interpreted as saving the existing custom or law relating to intestate succession and the exclusion of the applicability of Part V can be achieved only by a specific provision in that behalf contained in any other enactment. No other enactment was brought to my notice specifically excluding the applicability of the provisions of Part V of the Indian Succession Act, 1925 to the Christian of the former Travancore-Cochin State.

13. I have already referred to the fact that the learned Judges of the Travancore-Cochin High Court relied on a decision of the Calcutta High Court as well as a decision of the Judicial Commissioner of Himachal Pradesh. In *Nabujan* v. *Paushimoni*[1], learned Judges of the Calcutta High Court posed the question before them as follows:

> "The question appears to me to be whether the customary law of the Garos is to be held to fall within the expression used in sub-section (2) of section 29 'any other law for the time being in force'. If it is, then Garo customary law can be applied to such cases as this to the exclusion of the Indian Succession Act. If it is not, then the Indian Succession Act will apply to the exclusion of the Garo customary law".

and proceeded to state:

> "I have little doubt, then it would follow on the plain language of the section that the words 'any other law for the time being in force' of section 29 of the Indian Succession Act should be read as saving of a customary law for the Garos".

The learned Judges did refer to the decision of the Bombay High Court as well as the decision of the Calcutta High Court already referred to, but sought to distinguish the same on facts. Their ultimate conclusion was:

> "I am not aware of any consideration of general legal principles or of the public policy favouring such a revolutionary upheaval, unless the statutory provision of the Indian Succession Act compelled us to take the narrowest view of the interpretation of the section. I have found nothing arising from the consideration of the present case, which would compel me either in reason or by weight of authority to take the view that the words 'any other law for the time being in force' do not let in customary law; provided this fulfils the recognized conditions requisite before a custom is accorded by a Court of law the force of law".

Here again, with great respect to the learned Judges, I am unable to accep their interpretation of section 29 (2) of the ndian Succession Act, 1925. The learned Judges, in my opinion, have failed to consider the effect of the expression, "save as provided by any other law for the time being in force" in the context and setting in which it occurs. In *Prem Chand* v. *Lilawati*[1], the Judicial Commissioner had to consider the question of applicability of the provisions of the Indian Succession Act, where section 5 of the Punjab Laws Act, 1872, was in force. After referring to certain decisions of the Punjab High Court, holding the section 2 of the Indian Succession Act, 1865, allows exception in favour of rules other than these contained therein and therefore under section 5 of the Punjab Laws Act, 1872, the custom, if proved, is the first rule of decision, irrespective of all considerations of nationality and religion, and also after referring to the decision of the Calcutta High Court in *Nabujan* v. *Paushimoni*[2], concluded that it was open to the first defendant in that case to plead custom in matters of inheritance contrary to the provisions of the Succession Act. For the reasons I have already indicated, I am unable to accept this conclusion also as correct.

14. From section 29 of the Indian Succession Act, 1925, it was clear to the learned Judges of Travancore-Cochin High Court, that the Indian Succession Act was not intended to interfere with the personal law of communities which have settled laws of their own as regards

1. 54 Cal.W.N. 2 D.R. 14.

1. A.I.R. 1956 Him. Pra. 17.
2. 54 Cal. W.N. 2 D.R. 14.

intestate succession. In my opinion, such an intention can be gathered only from the language of the statute and the Courts are not at liberty to find an assumed intention which was not expressed in the statute itself. It is because of the intention not to interfere with the personal law of certain communities that sub-section (1) of section 29 was enacted. The language of section 29 (2) is clear that except to the extent indicated in sub-section (1) and any other exclusion specifically provided for by any other law in force, the provisions contained in Part V were meant to be of universal application. If the application of the statutory provisions is likely to cause any hardship or inconvenience sufficient safeguard is provided for in the statute itself for exemption. Section 332 of the Indian Succession Act 1865 provided that the Governor-General of India in Council shall, from time to time, have power, by an order either retrospectively from the passing of that Act or prospectively, to exempt from the operation of the whole, or any part of that Act, the members of any race, sect or tribe in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of that Act or of the part of the Act mentioned in the order. It is pursuant to this provision, the native Christians in the Province of Coorg were exempted from the provisions of the Succession Act retrospectively from 16th March, 1865. Similarly Khasias and Syntengs in Assam were exempted as having special laws of inheritance incompatible with the provisions of the Indian Succession Act, 1865. Section 3 of the Indian Succession Act, 1925, has taken the place of section 332 of the 1865 Act. Section 3 of the 1925 Act states that the State Government may, by notification in the Official Gazette, either retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe, to whom the State Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order. In my opinion, the existence of such a provision emphasises the universality of the application of the provisions of the Act and if any existing custom or law has to be saved, it can be done so only by an express provision in such law providing for the exclusion of the application of the provisions of the Indian Succession Act or by an order of exemption made under section 3 of the Act.

15. Hence, on my interpretation of section 29 (2) of the Indian Succession Act, 1925, it must follow that on the extension of the Indian Succession Act, 1925 to Part B State of Travancore-Cochin, the provisions contained in Part V of that Act became applicable to intestate succession of the Christians of that State, since there was no other Act in force in that State excluding such applicability. I have arrived at this conclusion solely on the language of section 29 (2) of the Act, without reference to the provisions contained in section 6 of the Central Act III of 1951. I have already referred to the fact that the learned Judges of the Travancore-Cochin High Court had assumed that section 29 (2) of the Indian Succession Act, 1925, had adopted the provisions of the Travancore Christian Succession Regulation I of 1032 by reference. Here again, with great respect to the learned Judges, I am unable to accept their reasoning. When the provisions contained in a particular statute are incorporated by reference in another statute, the language used for the purpose is entirely a different and distinct one. This question has been elaborately considered by a Full Bench of this Court in *A. M. J. Mohd. Kasim* v. *Assistant Collector, Central Excise*[1]. With reference to the language contained in section 29 (2) of the Indian Succession Act, 1925, it is impossible to hold that the said Act has incorporated the Travancore Christian Succession Regulation II of 1092 as part of it and therefore the said Regulation forms part of the Indian Succession Act, 1925.

16. Then there remains the question as to the effect of section 6 of the Central Act III of 1951, even assuming that my

1. (1961) 2 M.L.J. 382: (1961) M.L.J. (Crl.) 633: A.I.R. 1962 Mad. 85.

construction of section 29 (2) of the Indian Succession Act, 1925, is not correct. I have sufficiently indicated already that the Travancore Christian Succession Regulation II of 1092 is a law corresponding to the provisions contained in Part V of the Indian Succession Act, 1925. Both of them purport to be complete enactments on the question of intestate succession, so far as Christians are concerned. If so, I am unable to see why this Travancore Christian Succession Regulations II of 1092 cannot be said to be a corresponding law in force, with reference to Part V of the Indian Succession Act, 1925, within the meaning of section 6 of the Central Act III of 1951. The learned Judges of the Travancore-Cochin High Court themselves say:

> "If the Travancore Christian Succession Act can be regarded as law in force relating to intestate succession among Christians in Travancore that law is saved under sub-section (2) of section 29, Indian Succession Act."

This is with reference to their conclusion that Travancore Christian Succession Act has been saved by section 29 (2) of the Indian Succession Act, 1925. But when they come to consider the effect of section 6 of the Central Act III of 1951, they state:

> " The Travancore Christian Succession Act can in no sense be regarded as law corresponding to Part V, Indian Succession Act".

Even assuming that the learned Judges are right with regard to their interpretation of section 29 (2) of the Indian Succession Act, 1925, that provision can save only such law as providing for the same subject-matter as Part V of the Indian Succession Act, 1925. If that law does not provide for or deal with the same subject-matter, the question of saving it under section 29 (2) will not arise, because the two, namely, that law and Part V of the Indian Succession Act 1925, will be operating in two different fields. Therefore, if it is a corresponding law for section 29 (2), Indian Succession Act, it cannot but be a corresponding law for section 6 of the Central Act III of 1951. Hence, on the very conclusion of the learned Judges that the Travancore Christian Succession Regulation II of 1092 falls within the scope of "any other law for the time being in force" occurring in section 29 (2) of the Indian Succession Act, 1925, it must necessarily follow that the said Regulation will be the corresponding law, as contemplated by section 6 of Central Act III of 1951. Therefore, my conclusion is that even if I am wrong in the construction I have placed on section 29 (2) of the Indian Succession Act, 1925, still by virtue of section 6 of the Central Act III of 1951, the Travancore Christian Succession Regulation II of 1092 stood repealed with effect from 1st April, 1961. Swaminathan having admittedly died on 29th May, 1960, and no case of testamentary succession having been put forward, succession to his property will be governed only by the provisions contained in Part V of the Indian Succession Act, 1925.

17. But this conclusion of mine cannot finally dispose of the second appeal, since the Courts below have not considered as to what the position and the rights of the parties would have been, if the Indian Succession Act, 1925, had been applied. As I have mentioned already, Swaminathan did not leave behind any lineal descendant at all. The plaintiff and 9th defendant are merely his collaterals, the plaintiffs being children and grandchildren of one brother and the 9th defendant being another brother of Swaminathan. The provisions contained in Chapter II of Part V of the Indian Succession Act lay down the rules in case of intestates and different rules have been provided to meet different contingencies. Section 33-A (1) provides that where the intestate has left a widow but no lineal descendants and the nett value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow. Sub-section (2) of the same section states:

> "Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from

the date of the death of the intestate at 4 per cent. per annum until payment".

Section 33 states that save as provided by section 33-A if the intestate had left no lineal descendants, but had left a widow and persons who are of kindred to him, one half of his property shall belong to his widow and the other half shall go to those who are of kindred to him in the order and according to the rules provided for thereafter. In view of these provisions, the nett value of the assets of Swaminathan has to be ascertained.

18. Under these circumstances, the second appeal is allowed and the judgments and decrees of both the Courts below are set aside and the suit itself is remanded to the learned Subordinate Judge, Nagercoil, for disposal in accordance with law and in the light of this judgment holding that it is the provisions of the Indian Succession Act, 1925 that govern the succession to the estate of Swaminathan. I am making it quite clear that except for reversing the conclusion of the Courts below on the question whether it is the Indian Succession Act, 1925 or the Travancore Christian Succession Regulation II of 1092 that applies to the case in question I am not interfering with the other findings of fact recorded by the Courts below and those findings will stand.

19. It is unfortunate that I did not have the benefit of any arguments on behalf of the respondent, since none of the counsel appeared on behalf of the respondents in spite of my giving more than one opportunity in this behalf.

20. Each party will bear his costs in these proceedings in all the three Courts so far. The appellants will be entitled to a refund of Court-fee paid on the memoranda of appeal in this Court as well as the first appellate Court

No leave.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

M. R. V. Bus Service (Private) Ltd., represented by its Managing Director, Muthalif Rowther .. *Appellant**

v.

Ravi, minor, by next friend and mother and guardian V. Rajamanickammal as per order of Court dated 29th August, 1972 in C.M.P. No. 8993 of 1972 and another .. *Respondents.*

and

All India General Insurance Company, Limited .. *Appellant*

v.

M. R. V. Bus Service (Private) Limited, represented by Managing Director, Muthalif Rowther and others .. *Respondents.*

and

M. R. V. Bus Service (Private) Limited represented by its Managing Director, Muthalif Rowther .. *Appellant*

v.

K. Meyyappan and another .. *Respondents.*

and

The All India General Insurance Company, Limited .. *Appellant*

v.

M. R. V. Bus Service (Private) Limited represented by the Managing Director, Muthalif Rowther and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 110-B—Motor Accidents—Injury to boy—Claim for compensation—Assessment of quantum—Uniformity in awarding compensation whether girl or boy—Desirability.

In a motor accident claim, a boy who was injured was awarded a compensation

* A.A.O. Nos. 158 and 159 of 1968, 330 of 1970 and 48 of 1973. *21st February, 1973.*

of Rs. 25,000 by the Claims Tribunal. On appeal,

Held, In modern times it is not correct to assume that a girl is not expected to work for earning a livelihood, and that only a boy would become the future bread-winner of the family. The injuries sustained by the victim in the present case, though fairly serious, could not be said to be at any rate more serious than the injuries sustained by the girl child in *Ayesha Begum* v. *Veerappan*, (1966) 1 M.L.J. 374. The injury to the boy did not call for more compensation than what was awarded in the case of the girl child in that case. [*Para.* 12.]

The principle that there should be a certain amount of uniformity with regard to award of compensation would apply even to the present case. In the present case, the proper compensation payable was only Rs. 15,000 and not Rs. 25,000. [*Para.* 14.]

Cases referred to :

Bird v. *Coc King and Sons Ltd.*, (1961) 2 T.L.R. 1260 ; *Ayesha Begum* v. *Veerappan*, (1966) 1 M.L.J. 374; *Flint* v. *Lovell*, (1935) 1 K.B. 354 ; *Davies* v. *Powell Duffrya Associated Collieries, Limited*, L.R. (1942) A.C. 601 ; *Moray* v. *Woodfield*, (1963) 3 All E.R. 533 ; *Perumal* v. *State of Madras*, (1971) A.C.J. 144.

A.A.O. Nos. 158 *of* 1968 *and* 330 *of* 1970:

Appeals against the orders of the Motor Accidents Claims Tribunal (Sub-Court), Chingleput, dated 16th March, 1968 and in M.O.P. No. 60 of 1967.

A.A.O. No. 159 *of* 1968 *and* 48 *of* 1973:

Appeal against the order of the Motor Accidents Claims Tribunal (Sub-Court), Chingleput, dated 16th March, 1968 and made in M.O.P. No. 61 of 1967.

V. S. Ramakrishnan, V. Subramaniam and *V. P. Kumaravelu*, for Appellants.

S. Govindaswami and *N. Srivatsamani*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—These four civil miscellaneous appeals arise out of two claim petitions before the Motor Accidents Claims Tribunal, Chingleput. The said Tribunal disposed of three claim petitions by a common judgment, the claims in all these three petitions arising out of one and the same accident. The accident in question occurred on 11th May, 1967 at about 8.30 A.M., near Ambattur in Avadi-Madras Road. The vehicle involved in the accident is the bus bearing registration No. MDF 1376 owned by the 1st respondent in all the three petitions before the Claims Tribunal. Minor Ravi (by his next friend) is the petitioner in M.O.P. No. 60 of 1967. Meyyappan is the petitioner in M.O.P. No. 61 of 1967 and Annamalai is the petitioner in M.O.P. No. 64 of 1967. Out of these three petitioners, the first two *viz.*, minor Ravi and Meyyappan, were passengers in the bus concerned. The 2nd respondent in all these petitions was the driver of the vehicle and the 3rd respondent is the insurer of the vehicle.

2. Admittedly the bus MDF 1376 which had been engaged by a group of persons, was returning from Tirupati. When the bus was proceeding towards Madras on the morning of 11th May, 1967, it capsized. Minor Ravi, aged 5 years, who was one of the passengers in the bus, got serious injuries on his right forearm and the evidence discloses that this limb has been permanently impaired. Meyyappan, the petitioner in M.O.P. No. 61 of 1967, also received some injuries, though they are not so serious.

3. Annamalai, the petitioner in M.O.P. No. 64 of 1967, was said to be passing on the road on a cycle and he claimed that the bus in question actually knocked him down before it capsized and thereby he sustained injuries. The compensation claimed by minor Ravi in M.O.P. No. 60 of 1967 is Rs. 27,100, made up of Rs. 25,000 towards general damages and Rs. 2,100 towards special damages. Meyyappan, the petitioner in M.O.P. No. 61 of 1967, claimed a total sum of Rs. 5,900. Rs. 5,000 towards general damages and Rs. 900 towards special damages. Annamalai, the petitioner in M.O.P. No. 64 of 1967, claimed a total compensation of Rs. 15,000. The case of the petitioners is that the accident was brought about due to rash

and negligent driving of the bus in question. The owner of the bus and the insurer thereof, *viz.*, respondents 1 and 3 respectively in the three petitions, contested the petitions. Their main contention has been that there was neither negligence nor rashness on the part of the driver of the bus and therefore the petitioners were not entitled to any compensation. The Tribunal below held that Annamalai, the petitioner in M.O.P. No. 64 of 1967, had not been knocked down by the bus in question, that he should have been knocked down by a lorry which was going ahead of the bus and that therefore he was not entitled to claim any compensation against the respondents. The said petition was dismissed by the Tribunal and there is no appeal by Annamalai, the petitioner therein, against that decision. So in these appeals we are concerned only with the two petitioners, *viz.*, the petitioners in M.O.P. Nos. 60 and 61 of 1967. The Tribunal below awarded the entire sum of Rs. 27,100 claimed by the petitioner in M.O.P. No. 60 of 1967. In M.O.P. No. 61 of 1967, the Tribunal awarded a total sum of Rs. 2,950 (though the claim was for a total sum of Rs. 5,900). The Tribunal was of the view that the liability of the Insurance company was not limited to a sum of Rs. 2,000 for an injured passenger of the bus and, in the words of the Tribunal, " .... the liability of the 3rd respondent is fixed in the proportion which Rs. 20,000 would bear to the compensation awarded to both the petitioners, and to the remaining amount petitioners will be entitled from the 1st respondent. My findings on point 2 in M.O.P. Nos. 60 and 61 of 1967 are accordingly."

4. C.M.A. No. 158 of 1968 is filed by the owner of the bus (1st respondent) challenging the decision of the Tribunal below in M.O.P. No. 60 of 1967. C.M.A. No. 330 of 1970 is also against the decision in the said O.P. but this is filed by the Insurance company. C.M.A. No. 159 of 1968 is the appeal filed by the owner of the bus against the decision of the Tribunal in M.O.P. No. 61 of 1967 and C.M.A. No. 48 of 1973 is that filed by the Insurance company in the said O.P.

5. The first question that arises for consideration in all these four civil miscellaneous appeals is whether the accident was due to rash or negligent driving of the bus in question. The witnesses who spoke about the accident are Kandayya (P.W. 3), Ramaswami (P.W. 6) and Meyyappan, the petitioner in M.O.P. No. 61 of 1967 (P.W. 7), who were all persons travelling in the bus when it capsized. Apart from these three witnesses, Annamalai, the petitioner in M.O.P. No. 64 of 1967, gave evidence as P.W. 9 and he examined one Narayanaswami as P.W. 8 to support his version of the accident. Arumugam, the driver of the bus, who has been impleaded as the 2nd respondent in all these petitions, is the only witness examined on behalf of the respondents.

6. We might completely eschew the evidence of P.Ws. 8 and 9 because they put forward a version which was different from that of P.Ws. 3, 6 and 7 and R.W. 1, the driver of the bus, and the same has been disbelieved by the Tribunal below and that part of the Tribunal's finding is not in question before us. As we said earlier, Annamalai, the petitioner in M.O.P. No. 64 of 1967, has not filed any appeal against the dismissal of his petition. Therefore we have to examine the evidence of P.Ws. 3, 6 and 7 and R.W. 1.

7. The consistent version of P.Ws. 3, 6 and 7 is that the driver of the bus drove the vehicle at high speed in a reckless manner and was trying to overtake the lorry which was going ahead of the bus, in spite of the fact that the lorry was not giving way for overtaking. It is also in evidence that the passengers in the bus actually warned the driver of the bus not to go at such high speed and go cautiously. In spite of that, the bus driver accelerated his vehicle and, in an attempt to overtake the lorry, went to his extreme right side and ultimately the bus capsized.

8. That the bus capsized is an admitted fact. But R.W. 1 would say that he was driving the bus only at a slow speed, that the lorry was originally coming only behind the bus but it overtook the bus and went ahead of it, then the lorry knocked down Annamalai who was going on cycle in the same direction as the two motor vehicles were moving and the lorry sped away. According to R.W. 1, as

Annamalai was lying on the middle of the road, the bus had to be swerved to the extreme left side in order to avoid Annamalai being run over by the bus and, in that process, the bus got into a ditch and capsized. While the evidence of P.Ws. 3, 6 and 7 is that the bus capsized on the right side of the road and the bus actually fell on its right side, R.W. 1 would have it that it so capsized only left of the road and the bus fell on its left side. Unfortunately, none of the parties chose to examine the police officer who had visited the place of accident soon after the same. Even so, from the materials on record we have no doubt that the version of P.Ws. 3, 6 and 7 is true and the counter-version put forward by R.W. 1 has been rightly rejected by the Tribunal below. There are two important aspects which belie the present version of R.W. 1. In the claim petitions, M.O.P. Nos. 60 and 61 of 1967, there are clear averments to the effect that a lorry was going ahead of the bus, that the bus was driven at a reckless speed and the bus driver was trying to overtake the lorry in spite of warning by the passengers of the bus, that the bus went to the extreme right in the process of attempting to overtake the lorry and the bus capsized on the right margin of the road. The driver, who is the 2nd respondent in the petition, has not filed any written statement. The 1st respondent, *viz.*, the owner of the vehicle, has not denied in his written statement, that the lorry was going ahead of the bus and that the bus was trying to overtake the same. It has also not been denied that the bus capsized on the right side. There is not a word of the bus having to be driven to the extreme left of the road and the bus getting into the ditch on the left of the road resulting in the bus capsizing on its left side. Of course, the 1st respondent has not admitted that the bus was driven in a rash or negligent manner or that it was going at a reckless speed when it capsized. It is stated in the written statement that as the lorry, which was going ahead of the bus, knocked down the cyclist (Annamalai), the driver of the bus had to apply sudden brakes and that was the cause of the bus capsizing. This is an entirely different version from what is put forward by R. W. 1 in the witness box. As there has been no denial of the fact that the lorry was going ahead of the bus, that the bus was trying to overtake the same and that the bus capsized on the right side of the road, as far as the written statement goes, the present version of R. W. 1 cannot be accepted. The Tribunal below is perfectly right in accepting the evidence of P. Ws. 3, 6 and 7 regarding the circumstances under which the bus capsized. It is also significant that R. W. 1 had pleaded guilty to a charge of rash and negligent driving and causing injuries to the passengers, when he was prosecuted in the criminal Court. The finding of the Tribunal below that the accident, which resulted in injuries to minor Ravi and Meyyappan, was due to rash and negligent driving of the bus in question is correct.

9. Regarding the quantum of compensation, there is now no dispute as far as Meyyappan, the petitioner in M. O.P. No. 61 of 1967, is concerned. As seen earlier the Tribunal below has awarded a total compensation of Rs. 2,950 made up of Rs. 2,500 as general damages and Rs. 450 as special damages and that finding is not being questioned now. As far as this O. P. is concerned, the only question would be regarding the apportionment of the liability against the Insurance company. We will come to this question a little later.

10. In M. O. P. No. 60 of 1967, the finding of the Tribunal below that the minor petitioner is entitled to a sum of Rs. 2,100 towards special damages is not challenged before us. The only dispute is regarding the general damages of Rs. 25,000. The contention on behalf of the appellants (owner of the bus and the insurer thereof) is that the above sum fixed by the Tribunal below as general damages is too very high. Therefore the question is whether there is ground to reduce the above said sum of Rs. 25,000 fixed by the Tribunal below. P.W. 1 was a Civil Assistant Surgeon in the General Hospital, Madras, who had examined minor Ravi, he having been admitted in that hospital soon after the accident. There were three injuries. The first was lacerated wound, muscle deep, on the right arm. This is comparatively a minor injury. The other two are serious. The injury described as No. 2

is an extensive lacerated wound over the right forearm and elbow, completely damaging and lacerating the muscles and fracturing the right humerous. Injury No. 3 is a lacerated wound on the back of the right wrist, exposing the bone. There was no radiatory pulsation. The child was transferred to the orthopaedic department and he was in the hospital for over two weeks. P. W. 1 says that the right hand has been permanently disabled. Photographs of this child are marked as Exhibits A-10 to A-15. A look at these photographs which had been taken very much after the accident, shows that the child has practically lost that limb, though it has not been amputated. The forearm and the hand are completely deformed due to the injuries. The evidence shows that this child was sitting in the right side of the bus and when the bus turned turtle on its right side, the child had been thrown off and the right forearm and hand had been very seriously crushed. It is not seriously disputed that the child has practically lost this limb. The question is whether, under the above circumstances, the compensation of Rs. 25,000 awarded by the Tribunal is so high that it calls for interference by this Court.

11. In a case like this, under the head "general damages" compensation may have to be awarded taking into consideration (1) pain and suffering, both past and future ; (2) loss of what are called amenities, (i.e.), the pleasures that make life tolerable for most people ; (3) the chance of marriage becoming bleak ; (4) loss of earnings : (5) the cost of the attention to the victim, if any, he will need during the rest of his life ; and (6) the shortening of life due to the injury. But in this case the injury being to the right forearm and hand, it has not been claimed that due to this injury the child's life has been shortened. Therefore this child would be entitled to claim compensation under the first five heads. It is always extremely difficult to assess the quantum under the above heads. Birkett, L. J. observed in *Bird* v. *Coc King and Sons Ltd.*[1]:

"The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a Judge has to perform..... The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the Courts have been making these assessments over many years, and I think, that they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the Judge, or for the appellate Court if they are reviewing the matter, to consider the special facts in each case; for I agree..... that one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide. When, therefore, a particulate matter comes for review, one of the questions is, how does this accord with the general run of assessment made over the years in comparable cases "

Venkatadri, J., had to deal with a similar case in *Ayesha Begum* v. *Veerappan*[1]. That was a case where a girl aged 5 years had sustained a permanent injury in her pelvic bone which prevented free movement of her legs for all time to come. Considering the disfigurement caused to the child, the psychological reactions to the same, uncertain marriage prospects, difficulty of child-bearing and all other circumstances, the learned Judge held that the claim of Rs. 15,000 made on behalf of the child towards general damages was neither too low nor too high. The Tribunal below having awarded only a sum of Rs. 5,000 Venkatadri, J., allowed the appeal filed on behalf of the abovesaid child and awarded compensation of Rs. 15,000 towards general damages as claimed. In that judgment, Venkatadri, J., has referred to a number of decisions of the Courts in England which speak of the difficulties in assessing the compensation payable in a case

1. (1961) 2 T.L.R. 1260.

1. (1966) 1 M.L.J. 374.

like this. The Tribunal below, after referring to the judgment of Venkatadri, J., in the above case, stated that in the case before Venkatadri, J., the child was a girl which need not work for earning a livelihood and it was not expected to earn for the maintenance of others and that in the present case, the child being a boy and the future bread-winner of the family, the compensation of Rs. 25,000 claimed cannot be considered to be too high.

12. We consider that the distinction drawn by the learned Tribunal between the present case and that before Venkatadri, J., is not right. In modern times, it is not correct to assume that a girl is not expected to work for earning a livelihood, as stated by the Tribunal below and that only a boy would become the future bread-winner of the family. The injuries sustained by the victim in the present case, though fairly serious, in that the right forearm has been deformed, the same cannot be said to be at any rate more serious than the injuries sustained by the girl-child in the case before Venkatadri, J. There the child had sustained a permanent injury in the pelvic bone which prevented free movement of her legs for all time to come. The permanent impairment of the pelvic bone is certainly a very serious matter, especially for a girl-child. As the child has not been in a position to have free movement of her legs and the pelvic bone has been seriously affected and such impairment is a permanent one, it is quite likely that the child would not be in a position even to enjoy sex life. In any event, we do not consider that the injury to the boy in the present case calls for more compensation than what has been awarded in the case of the girl-child before Venkatadri, J.

13. The learned Counsel for the respondent referred to the decisions in *Flint* v. *Lovell*[1], *Davies* v. *Powell Duffrya Associated Collieries, Limited*[2], and *Moray* v. *Woodfield*[3], and contended that once the trial Judge assesses the compensation, the same should not be varied by the appellate Court unless the appellate Court is convinced either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the appellate Court, an entirely erroneous estimate of the damage to which the petitioners are entitled. But it is clear that even the Courts in England do make a distinction between an assessment of damage made by a trial Judge and that made by a jury. It has been pointed out in a number of cases that if the trial in which the compensation has been awarded is by a Judge alone, an appeal is a rehearing of the case and accordingly the Court of Appeal can vary the amount of damages awarded to what they consider is the proper amount. Of course, the assessment made by the trial Judge is not to be interfered with lightly. Even so, the appellate Court has to interfere if the sum awarded is out of line with the run of awards made in comparable cases. These principles are recognised by the Court of Appeal in England. In *Charlesworth on Negligence*, 4th Edition. para. 1260, the position is summed up thus :

> " On a trial by Judge alone, an appeal is a re-hearing of the case and accordingly the Court of Appeal can vary the amount of damages awarded to what they consider is the proper amount. The Court has, however, said. 'Unless we come to the conclusion that the learned Judge took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to the evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere.' The appellate Court will not interfere, unless the Judge has made "a wholly erroneous estimate of the damage suffered." Although the Court of Appeal are slow to interfere with the award of a Judge, they will do so more readily than in the case of the award of a jury, and in particular they will interfere if the sum awarded is out of line with the run of awards made in comparable cases in recent years. The tendency is towards a standardisation of damages, although it is recognised that exact

1. (1935) 1 K. B. 354.
2. L. R. (1942) A. C. 601.
3. (1962) 3 All E. R. 533.

standardisation is impossible and that the limits of variation are wide."

14. In *Perumal* v. *State of Madras*[1], Maharajan, J., had to consider the measure of damages in respect of the death of an infant. In that case, the Tribunal below had awarded a sum of Rs. 3,000 for the loss of the life of the child. This was enhanced by the learned Judge to a sum of Rs. 5,000. In doing so, the learned Judge observed :

> " Yet another difficulty that besets the Courts is this. Most appellate Courts refuse to interfere with the quantum of compensation awarded by the trial Courts on the ground that the sum awarded is neither unduly high nor unduly low. This principle of judicial neutrality has resulted in a lack of uniformity in the decisions of the trial Courts. In my experience, I have found that the compensation awarded for the death of the infant of the same age varies from Rs. 1,000 to Rs. 10,000 according to the discretion of the Judge concerned. The range of variation between one trial Judge and another in fixing the amount of compensation is almost whimsical and bewildering........In the absence of statutory guide-lines, I think that for the purpose of securing uniformity some workable formula should be evolved, which can be usefully followed by the trial Courts, after making marginal adjustments in the light of the peculiar facts of each individual case."

No doubt those observations were made in the case of death of an infant and not in a case of permanent injury to an infant. Even so, the principle that there should be certain amount of uniformity with regard to award of compensation would apply even to the present case. As already seen, Venkatadri, J., held in *Ayesha Begum* v. *Veerappan*[2], that a compensation of Rs. 15,000 in the case of injuries causing permanent infirmity of a child aged about 5 years is neither to high nor too low. We think that in the present case also, the proper compensation payable is only Rs. 15,000 and not Rs. 25,000.

15. There is no dispute that the injured boy (minor Ravi) is entitled to the sum of Rs. 2,100 towards special damages as fixed by the Tribunal below. Therefore minor Ravi would in all be entitled to a total sum of Rs. 17,000.

16. The only other question is regarding the liability of the Insurance company On this point the Tribunal below is not right. Under the provisions of the Motor Vehicles Act before the amendment of 1969, indisputably the liability of the Insurance company is limited to a sum of Rs. 2,000 per passenger in a bus if the policy is one conforming only to the provisions of the Motor Vehicles Act. That position is not disputed by any of the parties before us. The amended provision, which has increased the liability of the Insurance company, has no application to the present case as the accident occurred very much prior to the amendment and the claim itself had been made much earlier to the amendment. Therefore, the liability of the Insurance company would be only to the extent of Rs. 2,000 in the case of each of the two injured, *viz.*, minor Ravi and Meyyappan.

17. The result is, C. M. A. No. 159 of 1968 filed by the owner of the bus is partly allowed, but C. M. A. No. 158 of 1968 is dismissed. C. M A. Nos. 330 of 1970 and 48 of 1973 filed by the Insurance company are partly allowed and it is directed that out of the sum of Rs. 17,100 awarded to minor Ravi (petitioner in M. O. P. No. 60 of 1957), the 3rd respondent Insurance company is liable to pay only a sum of Rs. 2,000 and the balance is payable by the owner of the bus, *viz.*, the 1st respondent, and similarly in M. O. P. No. 61 of 1967, the Insurance company would be liable to pay only Rs. 2,000 out of the total sum of Rs. 2,950 awarded to Meyyappan, the petitioner in that case, and the balance of Rs. 950 is to be borne by the 1st respondent, *viz.*, the owner of the bus. There would be no order as to costs in any of these appeals.

—*Appeal No.* 158 *of* 1968 *dismissed.*
S J. *Appeal No.* 159 *of* 1968 *partly allowed.*
Appeals Nos. 330 *of* 1970 *and* 48 *of* 1973 *partly allowed.*

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1. 1971 A.C.J. 144.
2. (1966) 1 M.L.J. 374.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

M/s. Dhala Tanning Company (A.A.P. No. 12 of 1968)

M/s. Gemini Studios, Madras (A.A.O. No. 191 of 1968),

M/s. Vijaya Productions (P.) Limited, Lessees of Vijaya Vauhini Studio (A.A.O. No. 192 of 1968)
.. *Appellants**

v.

Employees State Insurance Corporation through its Inspector, Madras-14, Employees State Insurance Corporation .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), *section* 77 (1-A)—*Limitation Act (XXXVI of* 1963), *Article* 137—*Employees' contribution—Application before the Insurance Court—Limitation—Applications filed before the coming into force of section* 77 (1-*A*)—*Limitation cannot apply—Insurance Court—Not a civil Court—Article* 137 *of Limitation Act—Applies to civil Courts only—"Employee"—Casual labourer—To be counted to determine whether premises is factory—Whether a person is an employee—Application under section* 75 (2)—*Insurance Court can decide question.*

Where petitions under section 75 (2) of the Employees' State Insurance Act, 1948 were filed very much prior to 28th January, 1968, and they related to earlier periods, on the question of applicability of section 77 (1-A) which came into effect on that date prescribing a period of limitation,

Held, section 77 (1-A) prescribing a period of limitation of 3 years has no application. [*Para.* 3.]

On the question whether the petition would attract Article 137 of the Limitation Act of 1963,

Held, In order to attract Article 137 of the Limitation Act, 1963, the application should be to a Court. An application to a statutory body would not be governed by the said article. The Insurance Court is only a statutory body and not a Court governed by the Code of Civil Procedure. There is no distinction between a Labour Court constituted under the Industrial Disputes Act and an Insurance Court constituted under the Employees' State Insurance Act, regarding this aspect of the matter. [*Paras.* 10 *and* 11.]

On the question whether casual labourers will have to be counted to determine whether a premises is a factory,

Held, Even a casual labourer has to be counted in order to determine whether a particular premises is a factory as defined under the Act of 1948 or not. [*Para.* 17.]

In a petition under section 75 (2) of the Employees' State Insurance Act, 1948 it is open to the employer to raise the question that a particular person is not an employee and therefore no contribution is payable regarding such person. [*Para.* 21.]

Cases referred to :

Messrs. Solar Works v. *Employees' State Insurance Corporation, Madras*, (1964) 2 M.L.J. 223; *Employees' State Insurance Corporation* v. *Bharat Barrel and Drum Manufacturing Co.*, A.I.R. 1967 Bom. 472; *Bharat Barrel and Drum Manufacturing Co. Private Ltd.* v. *Employees' State Insurance Corporation*, (1972) 1 S.C.R. 867: A.I.R. 1972 S.C. 1935 ; *Bombay Gas Company Ltd.* v. *Gopal Bhiwa*, (1964) 3 S.C.R. 709 : A.I.R. 1964 S.C. 752 ; *Messrs. Chari and Ram* v. *Employees' State Insurance Corporation*, (1970) 2 M.L.J. 92; *Athani Municipality* v. *Labour Court, Hubli*, (1970) 1 S.C.J. 1 : (1970) 1 S.C.R. 51 : A.I.R. 1969 S.C. 1335; *Sha Mulchand & Co., Ltd.* v. *Jawahar Mills Ltd.*, 1953 S.C.R. 351 : (1953) 1 M.L.J. 364: 1953 S.C.J. 68 : A.I.R. 1953 S.C. 98 ; *Nityanand* v. *Life Insurance Corporation of India*, (1969) 2 S.C.J. 749: (1970) 1 S.C.R. 396: A.I.R. 1970 S.C. 209; *R. K. Kajaria* v. *C. Engineering (India) Ltd.*, A.I.R. 1972 Cal. 381; *Gnanambikai Mills* v. *Employees' State Insurance Corporation*, (1970) 2 L.L.J. 233; In e *K.V.V. Sarma*, I.L.R. (1953) Mad. 775 : (1952) 2 M.L.J. 917 : A.I.R. 1953 Mad. 269; *Employees' State Insurance Corporation* v. *Sriramulu Naidu*, I.L.R. (1960) Mad. 322: (1960) 1 M.L.J. 257 : A.I.R. 1960 Mad. 248.

Appeals against the Order of the City Civil Court (First Additional Judge),

*A.A.O. Nos. 12, 191 and 192 of 1968.
6th March, 1973.

Madras dated 25th August, 1967 and made in E.I.O.P. No. 36 dated 18th December, 1967 made in E.I.O.P. No. 6 of 1965 and dated 18th December, 1967 made in E.I.O.P. No. 35 of 1965.

A. N. Rangaswamy, R. M. Seshadri, for *N. Siva Sankaran* and *R. Narayanan*, for Appellants.

Ali Mohammed, for Central Government Standing Counsel, for Respondent in A.A. O. No. 12 of 1968.

K. Kumaraswami Pillai, for Additional Government Pleader, for Respondent in A.A.O. Nos. 191 and 192 of 1968.

The Order of the Court was pronounced by

Ramaswami, J.—These three Civil Miscellaneous Appeals arise out of three different petitions before the Employees' State Insurance Court, Madras. C.M. A. No. 12 of 1968 arises out of E.I.O.P. No. 36 of 1965 in which the Employees' State Insurance Corporation (hereinafter mentioned as the Corporation) claimed employees' contribution to the extent of Rs. 3,593 for the period 1st April, 1961 to 27th March, 1965 against Messrs. Dhala Tanning Company, a company which was engaged in running a tannery. C.M.A. No. 191 of 1968 arises out of E.I.O.P. No. 6 of 1965 in which the Corporation claimed a total sum of Rs. 59,145 against Messrs. Gemini Studios by its proprietor, S. S. Vasan, as employees' contribution for the period 20th November, 1955 to 31st December, 1964. C.M.A. No. 192 of 1968 arises out of E.I.O.P. No. 35 of 1965 filed by the Corporation claiming a sum of Rs. 58,842 towards employees' contribution for the period 20th November, 1955 to 31st August, 1963 against Messrs. Vijaya Productions (Private) Limited, lessees of Vijaya Vauhini Studios. Gemini Studios, the respondent in E.I.O.P. No. 6 of 1965, and Messrs. Vijaya Productions (Private) Limited, the respondent in E.I.O.P. No. 35 of 1965, are both concerned in producing motion pictures.

2. All the three petitions of the Corporation were under section 75 (2) of the Employees' State Insurance Act, 1948 (hereinafter called the Act) and the respective respondent contested the claim on various grounds. However; the Employees' Insurance Court (hereinafter called the Insurance Court) negatived the contentions of the respondent and allowed the petitions filed by the Corporation. The respective respondent in the three petitions has filed the three Civil Miscellaneous Appeals. We are disposing of all the three appeals by a common judgment as the main question raised in all these appeals is one and the same. *viz.*, question of limitation. As far as C.M.A. Nos. 191 and 192 of 1968 are concerned, all the questions raised are common to both. But it is not so in respect of C.M.A. No. 12 of 1968. However, as the main question, *viz.*, the question of limitation, is common to all these appeals, it would be convenient to dispose of them by a common judgment.

3. The learned Counsel appearing for Messrs. Gemini Studios, the appellant in C.M.A. No. 191 of 1968, argued the question of limitation at great length and the same arguments had been adopted by the learned Counsel in the other two appeals. For the purpose of this question, *viz.*, the question of limitation, it is enough to note the relevant facts in C.M.A. No. 191 of 1968. As seen earlier, the claim by the Corporation under section 75 (2) of the Act is for employees' contribution for the period 20th November, 1955 to 31st December, 1964. The petition by the Corporation to the Insurance Court making the abovesaid claim came to be filed only in 1965, even though the contribution claimed is for the period commencing from 20th November, 1955. Under the provisions of the Act, the employer shall pay to the Corporation not only the employer's contribution but also the employees' contribution, though employees' contribution so paid by the employer is recoverable by him from the wages of the employees. According to the Corporation, the claim is not barred, as no period of limitation had been prescribed under the Act in respect of contributions claimable by the Corporation. It is also its contention that no Article in the Indian Limitation Act has any application to a petition under section 75 (2) of the Act. By the Amendment Act XLIV

of 1966, a new provision has been introduced in the Act as section 77 (1-A) providing that an application under the Act to the Insurance Court shall be made within a period of 3 years from the date on which the cause of action arose. The abovesaid new provision came into effect on 28th January, 1968. Therefore, there is no difficulty regarding the question of limitation for petitions to the Insurance Act made after 28th January, 1968. But the petitions in the present appeals had been filed very much prior to 28th January, 1968 and they relate to earlier periods and therefore indisputably the new provisions, *viz.*, section 77 (1-A) prescribing a period of limitation of 3 years, has no application to the present matters.

4. Under section 96 of the Act, the State Government has been empowered to make rules in regard to matters enumerated under that section and such rules should be made after consultation with the Corporation. The State Government has, in fact, made the Madras State Insurance (Court) Rules, 1951 by virtue of the powers conferred on it by section 96 of the Act. Rule 17 of these rules as it originally stood provided that every application to the Insurance Court shall be brought within 12 months from the date on which the cause of action arose or, as the case may be, the claim became due. The rule also had a proviso stating that the Court may entertain an application after the abovesaid period of 12 months if it was satisfied that the applicant had sufficient reason for not making the application within the said period. In *Messrs. Solar Works* v. *Employees' State Insurance Corporation, Madras*[1], a Division Bench of this Court held that the abovesaid rule (rule 17 of he Madras State Insurance (Court) Rules, 1951) is *ultra vires* of the rule-making power of the State, conferred upon it by section 96 (1) of the Act. The State Government of Maharashtra had also made a similar rule as the abovesaid rule 17 and that was struck down as *ultra vires* by the Bombay High Court in *Employees' State Insurance Corporation* v. *Bharat Barrel and Drum Manfucturing Company*[2]. The said decision of the Bombay High Court has been confirmed by the Supreme Court in *Bharat Barrel and Drum Manufacturing Company Private Limited* v. *Employees' State Insurance Corporation*[1]. It is after the Courts held that the State Government had no authority to make a rule prescribing the period of limitation the amendment of 1966 introducing the new provision, section 77 (1-A), was passed. Therefore, the indisputable position is that as far as these appeals are concerned, there was no period of limitation prescribed under the Act.

5. However, the contention of Mr. R.M. Seshadri, the learned Counsel for the appellant in C.M.A. No. 191 of 1968, is that Article 137 of the Indian Limitation Act of 1963 would be applicable and the period of limitation for an application under section 75 of the Act is only 3 years from the date on which the right to apply accrued. His contention is that the claim of the Corporation for employees' contribution for a period of more than 3 years prior to the date of the application itself is clearly barred. The question, therefore, is whether Article 137 of the Limitation Act, 1963 would be applicable to these cases. Learned Counsel invited our attention to a number of decisions in this respect. The first is the Bombay decision which was referred to earlier, *viz.*, *Employees' State Insurance Corporation* v. *Bharat Barrel and Drum Manufacturing Company*[2], which held that the rule made by the State Government prescribing a period of limitation for an application under the Act is *ultra vires*. In that case, there was a reference by the Insurance Court of Bombay to the High Court under section 81 of the Act for the decision of two questions, *viz.*, (1) whether rule 17 of the Employees' State Insurance Rules is *ultra vires* of the rule making power of the State Government under section 96 (1) of the Employees' State Insurance Act and (2) If yes, what, if any limitation applies to applications filed by the Corporation to the Employees' Insurance Court? As we said, the Bench of the Bombay High

1. (1964) 2 M.L.J. 223.
2. A.I.R. 1967 Bom. 472.

1. (1972) 1 S.C.R. 867: A.I.R. 1972 S.C. 1935.
2. A.I.R. 1967 Bom. 472.

Court answered the first question in the affirmative holding that the rule by the State Government prescribing a period of limitation was *ultra vires*. Regarding the second question, they said that if the application under section 75 of the Act had been made prior to 1st January 1964, (the date on which the Limitation Act of 1963 came into force), the application is not subject to any period of limitation, but if the application is one made after the coming into force of the Limitation Act of 1963, the same would be covered by Article 137 of the said Act.

6. In *Bombay Gas Company Limited* v. *Gopal Bhiwa*[1], their Lordships of the Supreme Court have held that Article 181 of the Limitation Act of 1908 applies only to applications which are made under the Code of Civil Procedure. That is the residuary Article in the old Act and as there is no other Article which could possibly be applied for an application under section 75 of the Act, the Bombay High Court held that all applications under section 75 of the Act filed prior to 1st January, 1964, would not be subject to any period of limitation. Article 137 of the Limitation Act of 1963 is the one corresponding to Article 181 of the old Act. The Bombay High Court, without much discussion, observed that Article 137 of the new Act covers all applications for which no period of limitation is provided by other Articles in the Act and therefore applications under section 75 of the Act filed after 1st January, 1964 are subject to the period prescribed in the said Article, *viz.*, Article 137 of the Limitation Act of 1963. The only reason given by the Bombay High Court for the above conclusion is that the definition of the word "application" under section 2 (*b*) of the Limitation Act of 1963 includes a petition. However, with respect to the learned Judges of the Bombay High Court, we are unable to agree with their view that the definition of the word "application" under section 2 (*b*) of the new Limitation Act as including a petition makes any difference. The real question is whether Article 137 would be applicable to applications (including petitions) filed only under the Code of Civil Procedure or whether it would apply to applications under special enactments also and the further question would, be even if the said Article is applicable to applications made under special enactments, whether the said Article is applicable to applications not filed in a Court but before statutory bodies. The learned Counsel stated at one stage that the abovesaid Bombay decision having been confirmed by the Supreme Court in *Bharat Barrel and Drum Manufacturing Company* v. *Employees' State Insurance Corporation*[1], it must be taken that the question of limitation has been concluded. The Supreme Court has no doubt confirmed the decision of the Bombay High Court. But that is only regarding the question, whether rule 17 framed by the State Government was *ultra vires*. The question whether Article 137 of the Limitation Act of 1963 would be applicable to an application under section 75 of the Act was not before their Lordships of the Supreme Court. It is to be noted that in the case in which the two questions were referred to the Bombay High Court, the application under section 75 of the Act had been filed on 7th October, 1963 and the contribution claimed by the Corporation in that application was for the period 1st September, 1957 to 31st July, 1963. As the Bombay High Court answered the second question stating that in respect of applications filed prior to 1st January, 1964 there was no period of limitation at all the Corporation which filed the application before the Insurance Court succeeded fully. It was the opposite party *viz.*, the employer who had been contending that under rule 17 of the Employees' State Insurance Rules made by the State Government, the period of limitation was only 12 months from the date on which the right to claim arose, took the matter in appeal to the Supreme Court. The only question, therefore, before the Supreme Court was whether rule 17 was *ultra vires* or not. They agreed with the view of the Bombay High Court on that point and the appeal came to be dismissed. Under such circumstances, there is no substance in the contention of the learned Counsel

1. (1964) 3 S.C.R. 709: A.I.R. 1964 S.C. 752.

1. (1972) 1 S.C.R. 867: A.I.R. 1972 S.C. 1935.

that as the decision of the Bombay High Court has been confirmed by the Supreme Court, the question of limitation has been concluded. As a matter of fact, even the findings of the Bombay High Court on the second question referred to it, that in respect of applications made after 1st January, 1964. Article 137 of the Limitation Act of 1963 would be applicable, is in the nature of *obiter* because that question did not directly arise in that case. As already seen, the application by the Corporation under section 75 of the Act in that case had been filed prior to 1st January, 1964 and the Bombay High Court held, following the earlier Supreme Court decision in *Bombay Gas Company Limited* v. *Gopal Bhiwa*[1], that the application was not governed by any period of limitation. Whether the observation of the Bombay High Court that applications under section 75 of the Act made after 1st January, 1964 would be governed by Article 137 of the Limitation Act of 1963 is in the nature of *obiter* or not, with respect to the learned Judges, we are unable to agree with that view. Before giving our reasons therefor, we would like to refer to the other decisions relied on by the learned Counsel in this respect.

7. *Messrs. Chari and Ram* v. *Employees' State Insurance Corporation*[2], is a decision by a single Judge of this Court. The learned Judge, following the abovesaid Bombay decision, held that Article 137 of the new Limitation Act would be applicable to applications under section 75 of the Act filed after 1st January, 1964. Venkatadri, J., in disposing of Writ Petitions Nos. 843 of 1965, 3093 of 1965 and 4594 of 1965 by a common judgment followed the above Bombay decision. Incidentally it may be stated that one of the above three writ petitions was by Gemini Studios, the appellant in C.M.A. No. 191 of 1968 and that related to employer's special contribution under the transitory provisions of the Act. As the Corporation sought to recover certain amounts towards employer's special contribution under the provisions of the Revenue Recovery Act not only against the Gemini Studios, but also against certain other studios, the above writ petitions came to be filed.

8. There are two decisions of the Supreme Court throwing light on this question. In *Athani Municipality* v. *Labour Court, Hubli*[1], their Lordships of the Supreme Court had to consider whether Article 137 of the Limitation Act of 1963 would govern applications under section 33-C (2) of the Industrial Disputes Act or not. They held, overruling a Bombay decision, that the said Articles would not govern such applications on two grounds, *viz.*, (1) Article 137 governs only applications under the Code of Civil Procedure and (2) to attract Article 137, the application must be presented to a Court governed by the Code of Civil Procedure. It had been contended before their Lordships that Article 137 of the new Limitation Act is much wider in scope than the corresponding Article in the old Act, *viz.*, Article 181 and that therefore Article 137 must be held to govern even applications to the Labour Court under the Industrial Disputes Act. In dealing with this, their Lordships observe at page 1342, para. 10, as follows:—

> "It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as when prescribing the three years' period of limitation, the first column giving the description of the application reads as "any other application for which no period of limitation is provided elsewhere in this division". In fact, the addition of the word "other" between the words "any" and "application" would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *ejusdem generis* should be applied when interpreting the new Article 137. This word "other" implies a reference to earlier Articles, and, consequently, in interpreting this Article, regard must be

1. (1964) 3 S.C.R. 709 : A.I.R. 1964 S.C. 752.
2. (1970) 2 M.L.J. 92.

1. (1970) 1 S.C.J. 1 : (1970) 1 S.C.R. 51 : A.I.R. 1969 S.C. 1335.

had to the provisions contained in all the earlier Articles. The other Articles in the third division to the schedule refer to applications under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of the introduction in the third division of the schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of *Sha Mulchand and Company Limited* v. *Jawahar Mills Ltd.*[1]. We think that on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the schedule to the new Limitation Act containing reference to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the legislature was to drastically alter the scope of this Article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure."

9. Then, in para. 11, their Lordships pointed out that at best the further amendment made by introducing Article 137 in the new Act in the place of Article 181 of the old Act, would at best enlarge the scope of the third division to the schedule so as also to include some applications presented to Courts governed by the Code of Criminal Procedure. They stressed that one factor at least remains constant and that is that the applications must be to Courts if they are to be governed by the Articles in the third division. Their Lordships observed:—

"The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not Courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this Article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the Article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than Courts, are now to be governed for purposes of limitation by Article 137".

In *Nityanand* v. *Life Insurance Corporation of India*[1], a similar question arose. That was also in relation to an application to a Labour Court. After referring to *Athani Municipality* v. *Labour Court, Hubli*[2], and the two reasons given therein for coming to the conclusion that Article 137 of the Limitation Act, 1963 does not apply to applications to the Labour Court, it was observed at page 210:

"In our view Article 137 only contemplates applications to Courts. In the third division of the schedule to the Limitation Act, 1963, all other applications mentioned in the various Articles are applications filed in a Court. Further section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the Court is closed". Again under section 5 it is only a Court which is enabled to admit an application after the prescribed period has expired if the Court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to Courts, and that the Labour Court is not a Court within the Indian Limitation Act, 1963".

10. Therefore, it must be taken to be concluded that on the second ground, *viz.*

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1. 1953 S.C.R. 351 : (1953) 1 M.L.J. 364 : 1953 S.C.J. 68 : A.I.R. 1953 S.C. 98.

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1. (1969) 2 S.C.J. 749: (1970) 1 S.C.R. 396 : A.I.R. 1970 S.C. 209.
2. (1970) 1 S.C.J. 1 : A.I.R. 1969 S.C. 1335.

that in order to attract Article 137 of the Limitation Act, 1963, the application should be to a Court; an application to a statutory body would not be governed by the said Article.

11. The Insurance Court is only a statutory body and not a Court governed by the Code of Civil Procedure. Section 74 of the Act says that the State Government shall, by notification in the official Gazette, constitute an Employees' Insurance Court for such local area as may be specified in the notification. Under section 78 of the Act, certain powers of a civil Court are given to the Insurance Court. But it is not contended that because of such conferment of certain powers of a civil Court, the Insurance Court would be a civil Court itself. As a matter of fact, if the Insurance Court is a civil Court there would be no occasion for conferring certain of the powers of the civil Court on the said Insurance Court. Only for purposes of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, administering oath and recording evidence, the powers of a civil Court are conferred on the Insurance Court. The abovesaid section also provides that the Insurance Court shall be deemed to be a civil Court within the meaning of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. These provisions, far from making the Insurance Court a civil Court, only highlight the distinction between the Insurance Court and the civil Court. It is significant to note that under section 75 (3) of the Act, it is provided that no civil Court shall have jurisdiction to decide or deal with any question or dispute for which provision is made in the earlier sub-sections of that section. It is under section 75 the present applications are made to the Insurance Court and a sub-section of the very section provides that no civil Court shall have jurisdiction to entertain such disputes. That again goes to show that the Insurance Court is not a civil Court. We are unable to find any distinction between a Labour Court constituted under the Industrial Disputes Act and an Insurance Court constituted under the Employees' State Insurance Act, regarding this aspect of the matter.

12. Regarding the other reasons given in *Athani Municipality* v. *Labour Court, Hubli*[1], *viz.* that Article 137 would apply only to applications under the Code of Civil Procedure, *Nityanand* v. *Life Insurance Corporation of India*[2], said that it is not necessary to express their Lordships' view on the said ground and that it seemed to them that the question may require serious consideration whether applications to Courts under other provisions, apart from the Code of Civil Procedure, are included within Article 137 of the Limitation Act, 1963, or not. In view of the above observations of their Lordships of the Supreme Court in the subsequent judgment, *viz.*, *Nityanand* v. *Life Insurance Corporation of India*[2], and in view of the statement of objects and reasons of the Limitation Act, 1963, which said that the object is to provide a period of limitation for original applications and petitions under special laws, the learned Counsel contends that Article 137 cannot be confined to the applications under the Code of Civil Procedure. Though it is strictly not necessary to go into this question in great detail, as we are satisfied that Article 137 of the new Limitation Act would not be applicable to applications under the Act made to bodies which are not Courts, as the point was argued in some detail, we would deal with it in passing.

13. The submission was that Article 137 of the Limitation Act prescribes a period of three years for applications other than those which are not provided for under the third division, that is, it would include applications under special enactments other than Civil Procedure Code. In support of this contention, reference was made to the statement of objects and reasons of the Limitation Act, 1963 which states as follows:—

> "A new definition of application is being inserted so as to include a petition original or otherwise. The object

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1. (1970) 1 S.C.J. 1: A.I.R. 1969 S.C. 1335.
2. (1970) 1 S.C.R. 396 : (1969) 2 S.C.J. 749 : A.I.R. 1970 S.C. 209.

> is to provide a period of limitation for original applications and petitions under special laws as there is no such provision now".

The intention therefore in enacting the amended Limitation Act is to provide a period of limitation for original applications and petitions under special laws. The question is whether this object has been achieved.

Section 29 (2) of the Limitation Act provides as follows:—

> "Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law".

Under the sub-section, where a period of limitation is prescribed for any suit, appeal or application by any special or local law different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law. The provision made for suit, appeal or application under special or local laws would indicate that the Limitation Act would also apply to suits, appeals and applications under special or local laws, provided they are entertainable by the civil Courts. When the special or local law prescribes a period of limitation different from the period prescribed therefor by the first schedule, by virtue of the sub-section, the period prescribed by the special or local law will be applicable for determining the period of limitation. In the Limitation Act IX of 1908, the third division related to applications and Article 181 which is one of the Articles in the third division provided a period of three years for applications for which no period of limitation is provided elsewhere in the schedule. This has been construed as applications under the Civil Procedure Code. This Article has been construed as being applicable to applications under the Civil Procedure Code for which no period of limitation is provided for elsewhere. But under the new Act, XXXVI of 1963, the third division which relates to applications is divided into two parts and Article 137 is found in the second part. The second part is stated to be applicable to "other applications". Article 137 states that the period of limitation is three years for any other applications for which no period of limitation is provided elsewhere in the division. This Article would relate to applications which are not provided for in the third division and that would include applications which are mantainable by civil Courts whether under the Civil Procedure Code or under any other special or local law for which no period of limitation is provided elsewhere in this division. The wording of section 29 (2) of the Act would support this view as the period prescribed by any special or local law would prevail over the period prescribed in the schedule to the Limitation Act. But where no period is prescribed by any special or local law, the period mentioned in the schedule to the Limitation Act will be applicable. But the Article will be applicable only to applications made to a civil Court. This construction of Article 137 of Act XXXVI of 1963 would achieve the object and reasons of the Limitation Act in providing the period of limitation for original applications and petitions under special law.

14. In *R. K. Kajaria* v. *C. Engineering (India) Ltd.*[1], the Court held that the scope of Article 137 under the Limitation Act, 1963 has been widened by making the Act applicable to applications as also petitions under special enactments. The

1. A.I.R. 1972 Cal. 381.

Supreme Court in *Athani Municipality* v. *Labour Court, Hubli*[1], expressed its view that Article 137 and the Schedule to the Limitation Act do not apply to special enactments and that the law was not changed by the introduction of Article 137 of the new Limitation Act of 1963. In a subsequent decision in *Nityanand* v. *Life Insurance Corporation of India*[2], the Supreme Court held that its earlier view in *Athani Municipality* v. *Labour Court, Hubli*[1] requires serious consideration. This question is therefore open and there is considerable force in the contention raised by the learned Counsel for the appellant. It is unnecessary to decide the point raised as we are of the view that the Limitation Act is applicable only to applications made to a civil Court and as the present applications were not before civil Courts, Article 137 is not applicable.

15. Under these circumstances, we cannot hold that the question of limitation has been correctly decided in the decision relied on by the learned Counsel *viz.*, *Messrs. Chari and Ram* v. *Employees' State Insurance Corporation*[3]. The learned Judge who decided the said case in one part of his judgment, has held that the Limitation Act of 1963 does not provide any period of limitation in respect of applications before the Insurance Court. There, before the learned single Judge, the Corporation, instead of contending that the application to the Insurance Court is not governed by any period of limitation, put forward a contention that by virtue of section 17 of the Limitation Act, the period of limitation is extended. The contention was that the employer had failed to file the necessary returns and therefore section 17 of the Limitation Act was attracted. In rejecting that contention, the learned Judge observed that there is no specific period prescribed under the Limitation Act of 1963 in respect of applications to the Insurance Court. The reasoning is, as there is no period of limitation prescribed under the Limitation Act for such an application, section 17, which starts with the words "where, in the case of any suit or application for which a period of limitation is prescribed by this Act.." would have no application and that therefore there would be no question of the Corporation getting an extended period of limitation. This is what the learned Judge says:—

> "Section 17 (1) begins by saying:—
>
> "Where, in the case of any suit or application for which a period of limitation is prescribed by this Act..." There is no prescription, and hence section 17 cannot be invoked for the benefit of the respondent's contentions."

The above observation of the learned Judge would mean that no Article, including Article 137 of the Limitation Act, 1963, has any application to an application to the Insurance Court, though further down in the judgment the learned Judge stated that Article 137 would apply. Whatever that be in view of the Supreme Court decisions referred to earlier, we hold that there was no period of limitation in respect of the three applications with which we are concerned in these three appeals, as all of them had admittedly been filed prior to the 1966 amendment under which section 77 (1-A) of the Act came to be incorporated in the statute book.

16. Then taking the individual appeals, in C. M. A. No. 12 of 1968 the only other point raised is that casual workers are not employees as defined under the Act. According to the Corporation, the appellant in this case was having 30 employees, though some of them were only casual labourers. On the contrary, the case of the appellant put forward before the Insurance Court was that on no day more than 15 or 16 men worked in his factory and therefore the provisions of the Act cannot be applied. From the evidence on record, the Insurance Court came to the conclusion that the number of employees working in the appellant's factory exceeded 20 and that therefore the provisions of the Act applied and the appellant was bound to pay the employees' contribution. However, though a sum of Rs. 3,593 had been claimed on the basis that 30 employees were to be covered, the Insurance Court held

1. (1970) 1 S.C.J. 1 : A.I.R. 1969 S.C. 1335.
2. (1969) 2 S.C.J. 749 : A.I.R. 1970 S.C. 209.
3. (1970) 2 M.L.J. 97.

that the insurance cover was available only to 20 employees and that therefore only 2/3 of the total amount of Rs. 3,593 claimed is payable by the appellant to the Corporation towards employees' contribution.

17. The contention now is, the word "employee" as defined under the Act would not take in casual labourers. It is stated that even according to the corporation, out of the 30 workers found working on the dates of inspection by the Insurance Inspector, only 17 were permanent employees and the rest were casual labourers. The word "factory" has been defined as "any premises, including the precincts thereof, whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power," etc. Therefore, even if on one single day 20 or more persons had been employed for wages, it would be a factory, provided in any part of the premises a manufacturing process is carried on with the aid of power, etc. That would *prima facie* show that even a casual labourer has to be counted in order to determine whether a particular premises is a factory as defined under the Act or not. But whether a casual worker is entitled to insurance cover under the Act may be a different question. In *Gnanambikai Mills* v. *Employees' State Insurance Corporation*[1]. Ramamurti, J. has held that the provisions of the Act would not apply to casual workers. But we think it is not necessary to go into this aspect of the matter because, from the materials on record, we have to proceed on the footing that there were really 20 permanent workers in the premises in question. The Insurance Court has pointed out that apart from the 17 workers shown as permanent workers, there were admittedly three members of the supervisory staff by name Narayanan Nair, Vaidyanathan and Ansar who gave evidence as R.W. 1. The Insurance Court has pointed out that they are also employees. The Insurance Court, after referring to Exhibits B-1 to B-4 and B-7 to B-10 relied on by the appellant, says: "It is evident from some of the entries in these Exhibits coupled with the fact that there were 3 other monthly paid employees, *viz.*, P. Narayanan Nair, Vaidyanathan and the witness himself, the total number of employees at a time exceeded 20 and more on specified dates". It was never contended before us that this observation of the Insurance Court is wrong. We hold, therefore, that there is no merit in C.M.A. No. 12 of 1968 and that has to be dismissed.

1. (1970) 2 L.L.J. 233.

18. Coming to the other two C. M. As. the points raised are one and the same. As a matter of fact, the learned Counsel appearing for the appellant in C.M.A. No. 192 of 1968 did not add anything to what the learned Counsel in the other appeal (C.M.A. No. 191 of 1968) said. It is to be noted that the appellant in C.M.A. No. 192 of 1968 as well as that in C.M.A. No. 191 of 1968 is a studio engaged in film production. Mr. Seshadri, the learned Counsel in C.M.A. No. 191 of 1968, contends that because of a Bench decision of this Court in In re, *K. V. V. Sarma*[1], which was one under the Factories Act, both the parties, *viz.*, the Corporation as well as the appellant, proceeded on the footing that employees working in some of the departments of the studios are not entitled to insurance cover under the Act and that only after the decision of another Bench of this Court in *Employees' State Insurance Corporation* v. *Sriramulu Naidu*[2], the Corporation began to claim employees' contribution in respect of the employees in some of the departments in the studio, that in respect of such employees for whom contribution is now claimed, there had never been insurance cover and as many of such employees might have even left the employment, there is no chance of the appellant recouping the employees' contribution from their wages and that therefore the Corporation's claim should be negatived. But this contention is not sound. We may take it that the delay on the part of the

1. I.L.R. 1953 Mad. 775 : (1952) 2 M.L.J. 917 : A.I.R. 1953 Mad. 269.
2. I.L.R. 1960 Mad. 322 : (1960) 1 M.L.J. 257 : A.I.R. 1960 Mad 248.

Corporation in demanding the employees' contribution from the appellant was on the misapprehension that those employees, who were working in some of the departments of the studios, are not covered by the provisions of the Act. But when the employer has a statutory liability to pay not only the employer's contribution but also the employees' contribution (*see* section 40 of the Act), we do not understand how the appellant can escape liability, even if it be that the concerned employees had not had the benefits under the Act. The scheme of the Act is summarised by their Lordships of the Supreme Court in *Bharat Barrel and Drum Manufacturing Company* v. *Employees' State Insurance Corporation*[1], at page 1940, paragraph 13, and we think we can usefully extract the same. It is as follows:

"An examination of the purpose and intendment of the Act and the scheme which it effectuates leaves no doubt that it was enacted for the benefit of the employees and their dependants, in case of sickness, maternity and 'employment injury' as also to make provision for certain other matters. Section 40 makes the employer liable in the first instance to pay the contributions of the employer as well as the employee to the Corporation subject to the recovery from the employee of the amount he is liable to contribute. This liability on the employer is categorical and mandatory. He is further required under section 44 to submit to the Corporation returns as specified therein. Chapter V comprised of sections 46 to 73, deals with the benefits which includes among others, sickness and disablement benefit of the employee, his eligibility, for receiving payments and the compensation payable to his dependants. If the employer fails or neglects to pay the contributions as required, the corporation has the right to recover from him under section 68, the amounts specified in that section as an arrear of land revenue. Section 94 provides that the contributions due to a Corporation are deemed to be included in the debts under the Insolvency Acts and the Companies Act and are given priority over other debts in the distribution of the assets of a Company in liquidation. Chapter VI deals with adjudication of disputes and claims, of which section 74 provides for the constitution of the Insurance Court. Section 74 specifies the matters to be decided by that Court; section 76 and section 77 deal with the institution and commencement of proceedings and section 78 with the powers of the Insurance Court. Section 80 deals with the non-admissibility of the claim, if not made within twelve months after the claim is due, while section 82 (3) prescribes the period within which an appeal should be filed against the order of the Insurance Court. These provisions, in our view, unmistakably indicate that the whole scheme is dependent upon the contributions made by the employer not only with respect to the amounts payable by him but also in respect of those payable by the employee. No limitation has been fixed for the recovery of these amounts by the Corporation from the employer; on the other hand section 68 empowers the Corporation to resort to coercive process. If any such steps are proposed to be taken by the Corporation and the employer is aggrieved, he has a right to file and apply to the Insurance Court and have his claim adjudicated by it in the same way as the Corporation can prefer a claim in a case where the liability to pay is disputed".

It is not contended—and rightly, in our opinion that the Corporation is in any way estopped by its conduct from claiming employees' contribution after long lapse of time. Therefore there is no escaping the position that the appellant is bound to pay the employees' contribution, subject to the question of quantum.

19. Regarding the quantum of contribution, there is no dispute before us regarding the number of employees for whom contribution has to be paid. However, the learned Counsel contends that the Corporation is claiming contri-

1. A.I.R. 1972 S.C. 1935 : (1972) 1 S.C.R. 867.

bution on an *ad hoc* basis to which they are not entitled. Admittedly, the appellant has not filed the necessary returns as contemplated under section 44 of the Act.

20. Inspection of books had also not been given. Therefore, the Corporation assessed the employees' contribution on an *ad hoc* basis of Rs. 100 as the monthly wage of an employee. Section 45-A introduced by the amending Act (LXIV of 1966) says that where in respect of a factory or establishment no returns, etc. are furnished, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable by it in respect of the employees of that factory or establishment. Sub-section (2) of that section further says that such an order made by the Corporation shall be sufficient proof of the claim of the Corporation under section 75 of the Act. But this provision is not applicable to the present appeals. Therefore in the present cases the assessment made by the Corporation cannot be taken as sufficient proof of its claim. The Insurance Court has to take evidence on the point. As a matter of fact, the Insurance Court had called upon the appellant to produce the necessary books and accounts, but the appellant did not produce even a scrap of paper. The excuse is that the records are so voluminous that they could not be produced. It failed to give inspection of the records to the Corporation even after the filing of the application in the Insurance Court. Under such circumstances, even though adoption of the *ad hoc* figure of Rs. 100 per mensem as the wage of an employee is not strictly within the provisions of the Act and the matter might require further enquiry, the learned Counsel for the appellant stated that he will accept the assessment of the employees' contribution on the basis of Rs. 100 per mensem as the wage of an employee and that the matter need not be remitted to the Insurance Court for further enquiry. Under these circumstances, we accept the quantum of employees' contribution arrived at by the Insurance Court as correct.

21. The only other point raised by the learned Counsel is that the Corporation ought to have referred the question whether a particular employee comes within the definition of the word "employee" under the Act, to the Insurance Court before ever it makes a claim regarding employees' contribution. We have already referred to the scheme of the Act and there is absolutely nothing in the various provisions in support of such a contention. Under section 75, no doubt the question whether any person is an employee within the meaning of the Act is one within the jurisdiction of the Insurance Court to be decided. But that does not mean that before ever the Corporation makes a claim, it has necessarily to make a reference to the Insurance Court as to whether a particular person is an employee or not. Under sub-section (2) of section 75, the Insurance Court is empowered to decide the claim for the recovery of contributions from the principal employer. It is under that provision the petition has been filed. In this very petition it is open to the employer to raise the question that a particular person is not an employee and therefore no contribution is payable regarding such person.

22. Before the Insurance Court it had not been contended (in the petitions out of which C. M. A. Nos. 191 and 192 of 1968 arise), that any of the persons regarding whom employees' contribution was claimed was not an employee as defined under the Act. Even before us it is not the case of the learned Counsel that any of the persons regarding whom employees' contribution is claimed is not an employee as defined under the Act. But the point raised, as we said, is that the Corporation was bound to refer the question whether a particular person is an employee or not, before ever contribution is claimed. Such a contention is quite untenable, in the face of the various provisions of the Act.

23. The result is, all the three Civil Miscellaneous Appeals fail and they are dismissed. But, under the circumstances, there would be no order as to costs.

S.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT.—*K. S. Venkataraman* and *S. Maharajan, JJ.*

Cosmopolitan Club, Madras, represented by its Honorary Secretary S. Shanmugham .. *Appellant**

v.

Regional Provident Fund Commissioner, Madras .. *Respondent.*

Employees Provident Funds Act (XIX of 1952), *as amended in* 1958 *and* 1960—*Notification under section* 1 (3) (*b*)—*Inclusion of clubs for provident fund contribution—Validity challenged—* "*Any other establishment*"—*Meaning — Statement of Objects and Reasons—Value.*

There are two categories of establishments to which the Employees Provident Funds Act will apply. Firstly it will apply to a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed. Secondly on the terms of section 1 (3) (*b*) the Act will apply to any other establishment or class of such establishment employing 20 or more persons which the Central Government may specify. The word 'any' is general and the Act has given sufficient indication of the policy underlying its provisions. The only limitation is that the establishment should employ 20 or more persons. The Central Government can be expected to have all the relevant information enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. There is nothing in the Act to show that the wide scope of the words "any other establishment" should be limited to a commercial establishment. [*Para.* 6.]

Anything stated in the Statement of Objects and Reasons cannot curtail the wide scope of the words "any other establishment" in section 1(3) (*b*) of the Act. [*Para.* 7.]

* W.A. No. 2 of 1967. *9th April*, 1973.

Cases referred to :—

Mohammed Ali v. *Union of India*, (1963) Supp. 1 S.C.R. 993 : (1964) 1 S.C.J. 329: A.I.R. 1964 S.C. 980: *M. G. Poddar* v. *Regional Provident Fund Commissioner*, (1971) 1 L.L.J. 381; *State of Bombay* v. *Hospital Mazdoor Sabha*, 1960 S.C.J. 679 : 1960 S.C.R. 866; A.I.R. 1960 S.C. 610: *The Management of Safdarjung Hospital, New Delhi*, v. *K. S. Sethi*, (1970) 1 S.C.C. 735.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Srinivasan dated 25th November, 1965 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1058 of 1963 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the Regional Provident Fund Commissioner, Madras, the respondent herein to forbear from proceeding further in the matter in pursuance of his Memo. No. OC/MD/3084 Regd. dated 29th July, 1963.

A. K. Sree Raman and *A. S. Kailasam*, for Appellant.

Ali Mohamed, Junior Central Government Standing Counsel on behalf of Respondent.

The Order of the Court was pronounced by

Venkataraman, J.—This is an appeal directed against the judgment of Srinivasan J. dismissing the petition filed by the Cosmopolitan Club, Madras for a writ of *mandamus* prohibiting the Regional Provident Fund Commissioner, Madras taking action under the Employees' Provident Funds Act, 1952 as amended against the Cosmopolitan Club, Madras. Briefly speaking, the Act is intended to provide for the institution of provident funds for employees in factories and other establishments; the employer has to contribute 6¼%. The Cosmopolitan Club contends that the Act does not apply to them.

2. Originally section 1 (3) of the Act stood as follows:

"Subject to the provisions contained in section 16 (dealing with infant

factories) it applies in the first instance to all factories engaged in any industry sepcified in Schedule in which fifty or more persons are employed, but the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to all factories employing such number of persons less than fifty as may be specified in the notification and engaged in any such industry".

This was amended by Act XCIV of 1958 so as to read as follows:

"Subject to the provisions contained in section 16, it applies—

(*a*) to every establishment which is a factory engaged in any industry specified in Schedule I and in which fifty or more persons are employed, and

(*b*) to any other establishment employing fifty or more persons or class of such establishments which the Central Government may by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than fifty as may be specified in the notification".

3. This was further amended by Act No. XLVI of 1960 substituting the word 'twenty' for the word 'fifty'.

4. Under the powers vested in the Central Government by section 1 (3) (*b*) they issued the following notification on 31st May, 1963 *viz.*,

The Central Government hereby specifies the following classes of establishments in which 20 or more persons are employed as the establishments to which the Act shall apply with effect from, namely;

Societies, clubs or associations which provide board or lodging or both, or facilities for amusements or any other service to any of their members or to any of their guests on payment.

The Cosmopolitan Club, Madras, had in its employment more than 20 persons. Acting under this notification the Regional Provident Fund Commissioner, Madras issued a notice to the Cosmopolitan Club, Madras to submit a statement under the Act. Thereupon, the Cosmopolitan Club filed the writ petition contending that though more than 20 persons are employed in the Cosmopolitan Club it does not make profit, that it exists only for the purpose of providing amenities and facilities for the members thereof, that it is not a commercial establishment and that consequently it cannot be said to be an 'establishment' within the meaning of section 1 (3) of the Act even after the amendment. It is contended that the notification is *ultra vires* the Act. This contention was repelled by Srinivasan, J. and hence this appeal.

5. Srinivasan, J., relies on two decisions of the Supreme Court one of which directly concludes the point *i.e.*, the decision in *Mohammed Ali* v. *Union of India*[1]. There a similar notification extending the Act to (1) hotels and (2) restaurants was attacked on the ground that it was *ultra vires*. The contentions will appear from the following passage:

"It has been contended (1): that section 1 (3) (*b*) under which the notification including restaurants and hotels were brought under the operation of the Act, is invalid because it confers uncontrolled and uncanalised power on the Government; (2) that the Act was intended to apply to mere wage-earners and not to salaried people and that, therefore, the two notifications as a result of which the petitioners' employees have been brought within the purview of the Act are bad inasmuch as they are salaried employees and not mere wage-earners; and (3) that the scheme is bad under Article 14 of the Constitution because it is discriminatory".

Their Lordships of the Supreme Court rejected these contentions. We are mainly concerned with the observations

1. A.I.R. 1964 S.C. 980 : (1963) 1 S.C.R. (Supp.) 993 : (1964) 1 S.C.J. 329.

regarding contentions (1) and (3). Regarding contention (1), their Lordships of the Supreme Court observed as follows:

"In our opinion, there is no substance in any one of these contentions. It cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the Official Gazette specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and *other* establishments, as the preamble indicates. The institution of provident fund for employees is too well established to admit of any doubt as to its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments. Schedule I to the Act contains a list of a large variety of industries engaged in the manufacture of diverse commodities, mentioned therein. To all establishments which are factories engaged in the industries enumerated in Schedule I, the Act has been made applicable of its own force, subject to the provisions of section 16, which has indicated the establishments to which the Act shall not apply. The schedule is liable to be added to or modified so as to include other categories of industires not already included in Schedule I. So far as establishments which do not come within the description of factories engaged in industries, the Central Government has been vested with the power of specifying such establishments or class of the establishements, as it might determine, to be brought within the purview of the Act. The Act has given sufficient indication of the policy underlying its provisions, namely that it shall apply to all factories engaged in any kind of industry and to *all other* establishments employing 20 or more persons. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power to exempt given to the appropriate Government under section 17 is not uncanalised because clauses (*a*) and (*b*) of that section postulate that the exemption would be granted on the ground that the employees of those establishments are already in the enjoyment of benefits in the nature of provident fund, pension or gratuity not less favourable to them than under the Act".

Regarding contention (3) their Lordships of the Supreme Court observed as follows:

"It now remains to consider the third and the last contention raised on behalf of the petitioners, namely that the Act suffers from the vice of discrimination and, therefore infringes Article 14 of the Constitution. It is even more difficult to understand this contention, because as already pointed out, the Act applies to *all* establishments except those recited in section 16 which before its amendment by Act XLVI of 1960, exempted establishments belonging to Government or to a local authority. But whatever vice there may have been in that provision has been removed by amending the section....."

6. No doubt, the question before the Supreme Curt was only the vires of the notification. But in determining that question their Lordships had to interpret the Act, and while interpreting it they have, pointed out that there are two categories of establishments to which the Act will apply. Firstly, it will apply to a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed and the Central Government could add other industries

in Schedule I; a factory has also been defined in the Act. To a factory engaged in any industry specified in Schedule I, the Act will automatically apply. We are not concerned with that. Secondly, on the terms of section 1 (3) (*b*) the Act will apply to *any* other establishment or class of such establishment employing 20 or more persons which the Central Government may specify. The word 'any' is general and their Lordships point out that the Act has given sufficient indication of the policy underlying its provisions, namely, that it will apply to all factories engaged in any kind of industry and to *all* other establishments employing 20 or more persons. They point out that the only limitation is that the establishment should employ 20 or more persons and that the Central Government can be expected to have all the relevant information enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. In pointing out that the Act is not discriminatory their Lordships say that the Act applies to *all* establishments except those recited in section 16. There is nothing in the Act to show that the wide scope of the words 'any other establishment' should be limited to a commercial establishment as contended for by the appellant. The interpretation of their Lordships also shows that there is no scope for importing such a consideration in interpreting the words 'any other establishment'. After this interpretation by the highest Court, it is not possible to accede to the contention that the words 'any other establishment' should be so limited to 'commercial establishments'.

7. The learned Counsel for the appellant however relies on the Statement of Objects and Reasons of the amending Act XCIV of 1956 in support of this contention. They are:

> "The Employees' Provident Funds Act, 1952, applied originally to factories engaged in the six industries specified in Schedule I, namely, cement, cigarettes, electrical, mechanical or general engineering products, iron and steel, paper and textiles. Section 4 of the Act, provides for the extension of the Act to other factories by a notification in the Official Gazette. Of late, there has been a persistent demand for the extension of provident fund benefits to all industrial workers and the Act has recently been extended to seventeen additional factory industries by notification. Section 4, however, provides for application of the Act to factory industries only. There is no provision in the Act enabling its extension to other establishments like plantations, mines, commercial establishments etc. It is, therefore, proposed to include an enabling provision in the Act to the effect that, subject to the exemptions provided in section 16, the Act shall apply to any establishment or class of establishments as may be specified by the Central Government by notification in the Official Gazette."

He relies in particular on the following sentence.

"There is no provision in the Act enabling its extension to other establishments like plantations, mines, commercial establishments, etc." He urges that these words show that when the amending Act was introduced, the Government had only 'commercial establishments' in mind. We do not think that this sentence in the Statement of 'Objects and Reasons' can in any way curtail the wide scope of the words 'any other establishment' particularly when according to the interpretation placed by the Supreme Court, no such limitation can be imported.

8. There is a decision of the Calcutta High Court in *M.G. Poddar* v. *Regional Provident Fund Commissioner*[1], taking the same view which Srinivasan, J., has taken and we are also taking.

Srinivasan, J., has referred to another decision in *State of Bombay* v. *Hospital Mazdoor Sabha*[2], wherein their Lordships held that the concerned hospital was an industry within the meaning of the Industrial Disputes Act. There has

1. (1971) 1 L.L.J. 381.
2. A.I.R. 1960 S.C. 610 : 1960 S.C.J. 679 : 1960 S.C.R. 866.

been a change of opinion in the Supreme Court on that point in the later decision in *The Management of Safdarjung Hospital, New Delhi* v. *K.S. Sethi*[1]. But the definition of 'industry' in the Industrial Disputes Act is entirely different *viz.*, 'industry' means business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen. The word 'industry' has been defined with reference to so many words, whereas here 'any other establishment' are very general and are not curtailed by any limiting words. No purpose will be served by examining the matter further, particularly in view of the decision of the Supreme Court in *Mohammed Ali* v. *Union of India*[2], which in our opinion concludes the matter.

9. The appeal is accordingly dismissed but there will be no order as to costs.

10. The learned Counsel for the appellant prays that he may be given an opportunity to put forth his representation under section 7 (1). The stage for determining the amount due has not yet arrived as contemplated under section 7 (*a*). It will have to be preceded by an enquiry and no order determining the amount due from any employer shall be made under sub-section (1) unless the employer is given a reasonable opportunity to represent his case. We have no doubt that such an opportunity will be given.

P.S.P. ——— *Appeal dismissed.*

1. (1970) 1 S.C.C. 735.
2. (1964) 1 S.C.J. 329 : A.I.R. 1964 S.C. 980.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Natarajan, JJ.*

P. Sangili and others .. *Appellants**

v.

Ramakrishnan and others .. *Respondents.*

(A) *Hindu Religious and Charitable Endowments Act* (*XIX of* 1951), *section* 43—*Use of term "shall"—Construction—Mandatory or directory.*

(B) "*Collateral proceedings*"—*Meaning.*

(C) Res judicata — *Compromise-decree—Not a decision of Court so as to operate as* res judicata.

(D) *Evidence—Title deeds—To be correlated to the properties claimed.*

While considering whether the requirements of section 43 of the Hindu Religious and Charitable Endowments Act, are mandatory or directory, the Court has to take the following principles emerging from earlier decisions into consideration:

(1) There cannot be a universal rule to ascertain whether a mandatory form in a particular statute is intended to be really mandatory or only directory ;

(2) Whether it is mandatory or directory has to be ascertained from the intention of the Legislature in enacting the particular statutory provision ;

(3) That intention has to be gathered from the scope and object of the enactment ;

(4) If there is a penalty provided for disobedience of the statutory mandate, that may give an indication that the statutory provision was intended to be mandatory, and

(5) Even if there is no penalty provided for, then also the question whether it is mandatory or directory could be answered only by having regard to the object, purpose and scope of that law.

The object of section 43 of the Hindu Religious and Charitable Endowments

* A. No. 374 of 1967. 19*th July*, 1973.

Act is to see that no fraud is practised or no loss is caused to the religious institution concerned and this object can be achieved by investing the Commissioner, who has got the power of superintendence over all the religious institutions in the State, with authority to scrutinise the proposals for compromise or withdrawal of suit and on the basis of such a scrutiny to give or refuse to give sanction, based on his opinion that the said compromise or withdrawal was for the benefit of the institution or not.

[*Para.* 6.]

To construe the section as only directory is to give a *carte blanche* to a trustee representing a religious institution to play ducks and drakes with the property, right and interests of the institution only at the peril of being proceeded against and punished by way of removal or suspension under section 53 of the Act.

[*Para.* 6.]

Having regard to the object sought to be achieved by providing for sanction in section 43, it cannot be held that requirements of the section are merely directory.

[*Par.* 6.]

Even if the word "shall" has been used in a directory or recommendatory sense, in some other section of the Act, that fact will have no relevancy to the construction of section 43 and the meaning to be attributed to the word "shall" in that section.

The expression "collateral proceedings" is used in contra-distinction to proceedings arising directly out of the very order which is alleged to be null and void. On the other hand, if there are independent or parallel proceedings in which the validity of the said order is put in issue, such proceedings are said to be collateral proceedings. [*Para.* 7]

A compromise decree is not a decision by the Court and it is the acceptance by the Court of something to which the parties had agreed; and a compromise decree merely sets the seal of the Court on the agreement of the parties and the Court does not decide anything, nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court can be *res judicata* whether statutory under section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests and a compromise decree cannot strictly be regarded as a decision on a matter which was heard and decided and therefore cannot operate as *res judicata.*

[*Para.* 10]

As to the contention that the compromise decree in the earlier suits relating to the suit properties and their management must be construed as voidable and the plaintiff has to have them set aside and in so far as he has not prayed for setting aside those decrees, the decrees have become final and conclusive against him on the analogy of a minor as a party without complying with the provisions under Order 32, rule 7 of Civil Procedure Code, the Court held that:—

Under Order 32, rule 7, what is sought to be protected is the individual interest of the minor concerned while under section 43 of the Hindu Relgious and Charitable Endowments Act it is the rights and interests of a public religious institution in which the public as such is virtually interested that is protected. It is open to the plaintiff to ignore the said decree and pray for necessary relief of declaration of title and recovery of possession.

[*Para.* 11.]

Where certain title deeds of ancient dates have been put forward to make out the title of a temple to the various items enumerated in the plaint schedule, it is the duty of the plaintiff to correlate the different items of suit properties with the different title deeds he was putting forward in support of the title of the temple. Since objections filed by the appellants to the Commissioner's report had not been adverted to and the Commissioner was not also examined and the question of title had been disposed of summarily, the appeal was remanded to the trial Court for proper disposal with liberty to adduce fresh evidence. The scope of the fresh trial will be confined to only this aspect and the trial Court will not be free to consider any other point.

[*Para.* 12.]

Cases referred to :

Banarsi Das v. *Cane Commissioner, Uttar Pradesh and another*, A.I.R. 1963 S.C. 1417; *State of U.P.* v. *Manbodhan Lal*, 1958 S.C.J. 150: (1958) M.L.J. (Crl.) 85: 1958 S.C.R. 533: A.I.R. 1957 S.C. 912; *Bhikraj* v. *Union of India*, (1962) 2 S.C.J. 479: (1962) 2 S.C.R. 880: A.I.R. 1962 S.C. 113; *H. J. Dorairaj* v. *Viswanatha Rufa and Company and others*, A.I.R. 1973 Mad. 135; *Kiran Singh* v. *Chamanpaswan*, 1954 S.C.J. 514: (1955) 1 S.C.R. 117: (1954) 2 M.L.J. 60: A.I.R. 1954 S.C. 340; *Pulavarthi Venkata Subba Rao and others* v. *Valluri Jagannadha Rao (deceased) by his heirs and legal representatives and others*, (1964) 2 S.C.J. 518: (1964) 2 An.W.R. (S.C.) 112: (1964) 2 M.L.J. (S.C.) 112: (1964) 2 S.C.R. 310: A.I.R. 1967 S.C. 591.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga dated 31st March, 1967 and made in O.S.No. 39 of 1965.

A.K. Sreeraman, A. S. Kailasam and *R. Krishnamurthy*, for Appellants.

K.E. Rajagopalachari and *M. Subramaniam*, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—Defendants 7 to 11 in O.S. No. 39 of 1965 on the file of the Court of the Subordinate Judge of Sivaganga are the appellants herein. For the purpose of understanding the scope of the appeal, it is necessary to set out certain facts. The suit relates to one Sri Pallar Kaliamman temple, Gandhipuram Street, Virudhunagar and the suit properties are claimed to belong to the said temple. Admittedly the suit properties were in the possession of defendants 1 to 4 prior to the Hindu Religious and Charitable Endowments Department taking action under the provisions of the Madras Hindu Religious and Charitable Endowments Act, hereinafter referred to as the Act. The authorities functioning under the Act felt that the affairs of the temple were mismanaged and so three trustees were appointed by the Assistant Commissioner, Hindu Religious and Charitable Endowments, Madurai, and they were defendants 5 and 6 and one Sinnu, who died subsequently. Defendants 1 to 4 refused to hand over possession of the temple and its properties to the said trustees, defendants 5 and 6, and preferred a revision petition to the Commissioner, Hindu Relgious and Charitable Endowments and the same was dismissed on 13th December, 1954. Thereafter defendants 5 and 6 filed O.A. No. 143 of 1954 for issue of a certificate to take possession of the temple and its properties and such a certificate was issued and on the basis of the said certificate, proceedings were initiated before the Additional First-Class Magistrate, Virudhunagar, for taking possession. Under those circumstances, two persons by name Marudhan and Sangili acting for themselves and as representatives of the families of Pallas living in Kottaipatty, now known as Gandhipuram Street, Virudhunagar, filed O.S. No. 26 of 1957 on the file of the Court of the Subordinate Judge, Ramanathapuram at Madurai, to set aside the order of the Deputy Commissioner holding that the suit properties belonged to the suit temple and issuing a certificate to that effect. Defendants 1 to 4 also filed O.A. No. 38 of 1955 before the Deputy Commissioner, Hindu Religious and Charitable Endowments, Thanjavur, for a declaration that the suit temple is a private temple and not a public temple. The Deputy Commissioner by his order dated 18th April, 1957 held that the suit temple is a public religious institution. Defendants 1 to 4 then preferred an appeal before the Commissioner, Hindu Religious and Charitable Endowments, Madras, and that appeal was dismissed on 11th February, 1958. Thereafter, the aforesaid Marudhan and Sangili and another Alagu Kudumban for themselves and as representatives of the said family of Pallas filed another suit, O.S. No. 16 of 1958 on the file of the Court of the Subordinate Judge, Ramanathapuram at Madurai, to set aside the order of the Commissioner holding that the suit temple is a public institution. In both the suits, defendants 5 and 6 filed written statements contesting the case of the plaintiffs therein. However, both the suits were compromised on 22nd February, 1960, and under the terms of the compromise, practically all the suit properties were conceded to

belong to Pallar Podhu and not to the temple as such. The only concession that was made in favour of the temple in the compromise was that a sum of Rs. 750 out of the income from the properties was to be spent for the benefit and the festivals of the temple. In addition to that, the plaintiffs in the respective suits and the defendants adjusted Rs. 5,000 and Rs. 3,957 respectively said to be costs incurred by them in the suits and other proceedings from out of the income of the properties which were deposited into the Court by the Receiver. Decrees were passed in both the suits on the basis of the above compromise. The compromise decrees also provided that the suit properties should be handed over to A.G. Mariappan, the first defendant in the present suit and N. Arasappan, the fourth defendant in the present suit, on behalf of the said Pallar Podhu. Yet another suit, namely, O.S. No. 33 of 1960 on the file of the Court of the Subordinate Judge of Ramanathapuram at Madurai was filed for framing a scheme for the administration of the suit properties and in that suit also on the basis of consent of the parties, a scheme decree was passed. Neither the temple nor the trustees of the temple nor an officer of the Hindu Religious and Charitable Endowments Department was made a party to the said suit. In view of the conduct of defendants 5 and 6 in the two suits, namely, O.S. No. 26 of 1957 and O.S. 16 of 1958, they were removed from the office of trusteeship and the present plaintiff was appointed as the sole trustee of the suit temple for a period of five years by the Assistant Commissioner in his proceedings dated 6th October, 1960. It is thereafter the present suit was instituted for a declaration of the title of the temple to the suit properties, which are 30 items, and for recovery of possession of the same on behalf of the temple. The contention of the plaintiff was that the decrees passed in the three suits, namely, O.S. No. 26 of 1957, O.S. No. 16 of 1958 and O.S. No. 33 of 1960 were collusive and also void as being hit by section 43 of the Act and consequently they are not binding on the suit temple and its properties. Principally on this ground the present suit was instituted for the reliefs referred to above. Defendants 1 to 3 filed a written statement putting forward a contention that the suit properties did not belong to the temple and they belonged to Pallar Podhu, who themselves managed the suit temple; that the decrees in the suits referred to above were not collusive decrees and they were valid decrees and that the plaintiff without praying for setting aside the decrees within the time prescribed by law could not straightaway file a suit for a declaration of title of the temple to the suit properties and for recovery of possession thereof. They also put forward a contention that in view of the fact that a writ petition was pending on the file of this Court at that time, the suit could not be proceeded with and that the plaintiff himself had no right or authority to represent the suit temple in the present action. On the basis of these pleadings, the learned trial Judge framed the necessary issues and the issues so framed and subsequently recast are as follows:—

(1) Are the decrees passed by the Sub-Court, Ramanathapuram in O.S. Nos. 26 of 1957, 16 of 1958 and 33 of 1960, vitiated by collusion between the plaintiff or plaintiffs in those suits with the defendants who were sued in a representative capacity as trustees representing the suit temple?

(2) Is the suit temple a public religious institution ?

3. Is the scheme decree passed in O.S. No. 33 of 1960 an illegal one on the ground that the scheme had to be framed only under Endowments Act of 1951 ?

(4) Has the plaintiff to ask for the relief of setting aside the (decrees in) former suits O.S. Nos. 26 of 1957 and 16 of 1958 on the file of Sub-Court, Ramanathapuram at Madurai? (as recast)

(5) Is the plaintiff a legally appointed trustee?

(6) Do the suit properties belong to the suit temple?

(7) Whether the suit is barred by *res judicata* by reason of O.S. Nos. 26 of 1957 and 16 of 1958 ? (as recast)

(8) Has not this Court jurisdiction by reason of section 108 of the Hindu Religious and Charitable Endowments Act of 1959?

(9) Is the suit sustainable in view of the pendency of writ petition filed by the defendants before the High Court ?

(10) Is the suit barred by limitation ?

(11) Is the plaintiff entitled to mesne profits and if so, in what quantum ?

The learned Subordinate Judge by his judgment and decree dated 31st January, 1967, held that the decree in all the previous suits were collusive, void and inoperative and there was no need for the plaintiff to have them set aside. He also came to the conclusion that the suit properties belong to the suit temple and consequently the trustee was entitled to recover possession of the same on behalf of the temple. We may mention at this stage itself that out of 30 items referred to, the plaintiff conceded that the suit temple had no right to item 30 and therefore a decree was passed only in relation to items 1 to 29. In this view, the learned Subordinate Judge decreed the suit as prayed for. Hence, the present appeal by defendants 7 to 11, who claim to represent Pallar Podhu.

2. Mr. A. K. Sreeraman, learned Counsel for the appellants, advanced the following arguments before us:

(1) Section 43 of the Act is only directory and not mandatory and therefore the consent decrees passed without complying with the requirements of that section are neither void nor inoperative and the result of non-compliance with the said section will only render the trustees liable to disciplinary action under section 53 of the Act and the compromise decrees themselves will not be affected.

(2) Though the decrees in those suits were based on compromise, still they are decrees of Court and consequently so long as the decrees stand, it is not open to the plaintiff in the present action to ignore those decrees and file the present suit, because those decrees will operate as *res judicata* ; and if at all the plaintiff should seek to set aside those decrees.

(3) The plaintiff having come forward with a case praying for a declaration of title of the temple to the suit properties, the burden is on the plaintiff to make out the temple's title to the suit properties and that has not been made out; the trial Judge has not considered the various objections put forward by the appellants to the Commissioner's report and the trial Judge without correlating the suit properties with the title deeds put forward by the plaintiff merely proceeded to decree the suit on the basis of the Commissioner's report. We shall consider these arguments in the order mentioned above.

3. As far as the first argument is concerned, it is an admitted fact that the decrees in all the three suits were passed by consent of the parties. In addition to this, in O.S. No. 33 of 1960, there was a further infirmity, namely, neither the temple nor the trustees of the temple nor an officer of the Hindu Religious and Charitable Endowments Department was made a party to that suit. Consequently, it can be held without any difficulty that the decree in O.S. No. 33 of 1960 cannot be said to be binding on the plaintiff or the suit temple. The position with regard to the decrees passed in O.S. Nos. 26 of 1957 and 16 of 1958 stands on a slightly different footing. To those suits, the suit temple itself was made a party and it was represented by defendants 5 and 6 that the plaintiffs therein purported to represent the entire Pallar Podhu. As we have pointed out already, the decrees in those suits were passed on the basis of consent of the parties and the decrees stated that the suit properties did not belong to the suit temple, but belonged to Pallar Podhu and that the temple as such was not a public religious institution, but belonged to Pallar Podhu. The question for consideration is, whether the said decrees can be said to be collusive and fraudulent ones, having regard to the stand taken by defendants 5 and 6 in the original written statements filed by them and the subsequent total and complete surrender they made in favour of the plaintiffs therein. Having regard to the terms by which each side purported to take a huge sum of money

from the temple income, said to be representing costs and expenses incurred by them in the litigation, there can be no doubt whatever that the compromise decrees were not *bona fide* ones and they were collusive ones between the parties.

4. Apart from this, there is yet another infirmity with regard to those decrees as having been passed in opposition to the provisions contained in section 43 of the Act referred to above. That section states:

> "No suit, application or appeal pending before a Court to which a religious institution is a party shall be withdrawn or compromised by the trustee of the institution except with the previous sanction of the Commissioner".

The argument of the learned Counsel for the appellants is that though the section uses the word, "shall", the provisions of the section are not mandatory, but only directory; consequently, failure to comply with the requirements of that section will not nullify the decrees themselves, though it may render the trustees of the temple, namely, defendants 5 and 6 to be proceeded against under section 53 of the Act on the ground that they had failed to discharge the duties and perform the functions of trustees in accordance with the provisions of the Act or the rules made thereunder. The learned Counsel further contended that there are several other sections in the Act in which the word, "shall" has been used, but in all those sections, it cannot be held that the word , "shall" has been used in a mandatory sense and so also in section 43, the word, "shall" should not be construed as imposing a mandate and it can be construed to be only directory. In support of his contention, the learned Counsel drew our attention to a decision of the Supreme Court in *Banarsi Das* v. *Cane Commissioner, Uttar Pradesh and another*[1]. In paragraphs 18 and 19 of the judgment, the Supreme Court stated:

> "The general rule as to which provision of law can be regarded as mandatory and which directory is stated in Maxwell on Interpretation of Statutes (11th Edition) at page 364:
>
> "It has been said that no rule can be laid down for determining whether the command (of the statute) is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (R. *v. Ingall*[1] per Lush, J.) and when that result would involve general inconvenience, or injustice to innocent persons, or advantage to those guilty of neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

5. This rule has been applied in many cases both in India and in England. In *State of U.P.* v. *Manbodhan Lal*[2], this Court observed that no general rule can be laid down but the object of the statute must be looked at and even if the provision be worded in a mandatory form, if its neglect would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it is to be treated only as directory and the neglect of it though punishable would not affect the validity of the acts done. These observations have been followed in other cases and recently in *Bhikraj* v. *Union of India*[3], it was observed that where a

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1. A.I.R 1963 S.C. 1417.

1. (1877) 2 Q.B.D. 199 at p. 208.
2. 1958 S.C.J. 150 : (1958) M.L.J. (Crl.) 85 : 1958 S.C.R. 533 : A.I.R. 1957 S.C. 912.
3. (1962) 2 S.C.J. 479: (1962) 2 S.C.R. 880 : A.I.R. 1962 S.C 113 at p. 119.

statute requires that a thing shall be done in a particular manner or form but does not itself set out the consequences of non-compliance the question whether the prescription of law shall be treated as mandatory or directory could only be solved by regarding the object, purpose and scope of that law. If the statute is found to be directory a penalty may be incurred for non-compliance but the act or thing done is regarded as good. It is unnecessary to multiply these cases which are based upon the statement in Maxwell which is quoted over and over again." From this statement of the law, all that can be gathered is:

(1) There cannot be a universal rule to ascertain whether a mandatory form in a particular statute is intended to be really mandatory or only directory.

(2) Whether it is mandatory or directory has to be ascertained from the intention of the Legislature in enacting the particular statutory provision,

(3) That intention has to be gathered from the scope and object of the enactment,

(4) If there is a penalty provided for disobedience of the statutory mandate, that may give an indication that the statutory provision was intended to be mandatory, and

(5) Even if there is no penalty provided for, then also the question whether it is mandatory or directory could be answered only by having regard to the object, purpose and scope of that law.

Therefore, against the background of the above position, we have now to consider whether the requirements of section 43 of the Act, which we are considering, are mandatory or directory.

6. The Act was enacted to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in this State. The object of section 43 is to see that no fraud is practised or no loss is caused to the religious institutions concerned and this object can be achieved by investing the Commissioner, who has got the power of superintendence over all religious institutions in the State, with authority to scrutinise the proposals for compromise or withdrawal of suit and on the basis of such scrutiny to give or refuse to give sanction, based on his opinion that the said compromise or withdrawal was for the benefit of the institution or not. Having regard to the narrow scope of section 43, we are unable to see what public inconvenience will be caused, if section 43 is construed to be mandatory. By construing the provision of the said section as mandatory, we are preserving the rights and interests of a religious institution, which are really in the interests of the public. On the other hand, to construe the section as only directory is to give a *carte blanche* to a trustee representing a religious institution to play ducks and drakes with the property, rights and interests of the institution only at the peril of being proceeded against and punished by way of removal or suspension under section 53 of the Act. Having regard to the object sought to be achieved by providing for sanction in section 43, we are unable to hold that the requirements of the section are merely directory. The section is a salutary provision enacted with the express object of safeguarding the interests of a public religious institution for the benefit of the public as a whole and therefore the reasonable way of construing that section is that the provisions contained therein are mandatory. Even if the word, "shall" has been used in a directory or recommendatory sense, in some other section of the Act, in our opinion that fact will have no relevancy to the construction of section 43 and the meaning to be attributed to the word, "shall" in that section. Therefore, having borne in mind the principles laid down by the Supreme Court to which we have drawn attention, we are clearly of the opinion that as far as section 43 is concerned, the object and the scheme of the statutory provision make it absolutely and abundantly clear that the word, "shall" has been used in that section only in the mandatory form and sense and therefore any failure to comply with the requirements of section 43 will render the resulting action inoperative and totally void.

7. Mr. A. K. Sreeraman, learned Counsel for the appellants, drew our

attention to some observations contained in a judgment of a Bench of this Court to which one of us was a party in *H. J. Dorairaj* v. *Viswanatha Rufa and Company and others*[1]. In that case the Bench was considering an argument based on the contention that a particular order passed by Ramamurti, J., was null and void. In that context, the Bench quoted the following passage in the judgment of the Supreme Court in *Kiran Singh* v. *Chamanpaswan*[2].

> "It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties".

Mr. Sreeraman's argument is that the present is not a collateral proceeding and therefore the plaintiff cannot question the validity of the compromise decrees passed in the other suits and secondly the plaintiff can take such action only when the compromise decrees are set up against the interests of the plaintiff and not when the plaintiff himself has voluntarily come forward to file the present suit after referring to the compromise decrees. We are unable to see any substance in this argument. The expression, "collateral proceedings" is used in contra-distinction to proceedings arising directly out of the very order which is alleged to be null and void. If an appeal or revision is preferred against an order alleged to be null and void, that is said to be a direct proceeding with reference to such an order. On the other hand, if there are independent or parallel proceedings in which the validity of the said order is put in issue, such proceedings are said to be collateral proceedings. Consequently, the expression, "collateral proceedings" has to be understood only in this sense and if so understood, the present suit instituted by the plaintiff is a collateral proceeding.

1. A.I.R. 1973 Mad. 135.
2. 1954 S.C.J. 514 : (1955) 1 S.C.R. 117 : (1954) 2 M.L.J. 60 : A.I.R. 1954 S.C. 340.

8. With regard to the second part of the argument, we are clearly of the opinion that what we have already referred to will show that defendants 1 to 4 as well as the appellants herein representing Pallar Podhu had been claiming the suit properties as their own, on the basis of the compromise decrees referred to earlier and therefore that has thrown a cloud on the title of the temple to the suit properties and that consequently the plaintiff was entitled to come forward with the present suit putting forward the contention that the compromise decrees in the earlier suits were null and void.

9. Under these circumstances, we reject the first argument of the learned Counsel for the appellants.

10. As far as the second argument is concerned, it is enough to refer to the decision of the Supreme Court in *Pulavarthi Venkata Subba Rao and others* v. *Valluri Jagannadha Rao (deceased) by his heirs and legal representatives and others*[1]. In that case, the Supreme Court held that a compromise decree is not a decision by the Court and it is the acceptance by the Court of something to which the parties had agreed; and a compromise decree merely sets the seal of the Court on the agreement of the parties and the Court does not decide anything, nor can it be said that a decision of the Court was implicit in it. The Supreme Court further held that only a decision by the Court can be *res judicata*, whether statutory under section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests and such a decree cannot strictly be regarded as decision on a matter which was heard and finally decided and therefore cannot operate as *res judicata*. This decision clearly shows that the compromise decrees in the suits referred to above cannot be put

1. (1964) 2 S.C.J. 518 : (1964) 2 An.W.R.(S.C.) 112 : (1964) 2 M.L.J. (S.C.) 112 : (1964) 2 S.C.R. 310 : A.I.R. 1967 S.C. 591.

forth as constituting *res judicata* by the appellants herein.

11. With regard to the necessity for setting aside the decrees, Mr. Sreeraman relied on certain decisions rendered with reference to Order 32, rule 7, Code of Civil Procedure and contended that a compromise decree passed in a suit to which a minor is a party without complying with the requirements of the provisions referred to above has been held to be only voidable and it has got to be set aside and if it is not set aside by taking appropriate proceedings within the time prescribed by law, the said decree will become final and fully operative, and similarly the compromise decrees in the earlier suits also must be construed to be only voidable and the plaintiff has to have them set aside and in so far as he has not prayed for setting aside those decrees, the said decrees have become final and conclusive against the plaintiff. We are unable to draw any analogy between the provisions contained in Order 32, rule 7, Code of Civil Procedure and section 43 of the Act, because in the former case, what is sought to be protected is the individual interest of the minor concerned, while in the latter what is sought to be protected is the rights and interests of a public religious institution in which the public as such is vitally interested. The reason is that a trustee who is in temporary charge of a public religious institution should not be permitted to inflict a permanent damage and cause irreparable injury to the institution concerned; on the other hand, in the case of a minor, the provisions contained in the procedural law are intended to safeguard the interests of such minor against the possible vagaries and malpractices of the guardian and on attaining majority he has the liberty and opportunity of avoiding or affirming the compromise if the requirements of the procedural law had not been complied with. Therefore, we are of the opinion that it is open to the plaintiff to ignore the said decrees and pray for necessary relief of declaration of title and recovery of possession on the basis that the said decrees are null and void and inoperative. Hence, we reject the second argument of the learned Counsel for the appellants.

12. As far as the third argument is concerned, we are of the opinion that the grievance of the appellants is justified. As we have pointed out already, 30 items are involved in the suit. With regard to item 30, the plaintiff conceded that the temple had no right. With regard to the other items again, admittedly there are no title deeds in respect of items 19 to 22 and 29. Notwithstanding this, the learned Subordinate Judge has granted a decree in favour of the plaintiff in respect of these items also. With regard to the other items also there had been a great deal of controversy between the parties as to the identity of the said properties with reference to the title deeds put forward by the plaintiff. The learned Subordinate Judge unfortunately had not considered this question in detail as he ought to have done. Here is a case where certain title deeds of ancient dates had been put forward to make out the title of the temple to the various items enumerated in the plaint schedule and therefore it was the duty of the plaintiff to correlate the different items of the suit properties with the different title deeds he was putting forward in support of the title of the temple and make out his case. Unfortunately the very evidence of the plaintiff as P.W. 1 clearly shows that no such correlation had been made by the plaintiff. P.W. 1, who is the trustee-cum-Executive Officer, has in his evidence candidly admitted, that he could not correlate the title deeds filed by him with the suit items and he could not say where the items covered by the title deeds are situate. In the light of this evidence of P.W. 1, it passes one's comprehension as to how the learned trial judge could have granted a decree declaring the title of the temple to all the 29 items. We are not expressing any final opinion as to whether the plaintiff has made out the title of the temple to all the 29 items or not, in view of the fact that we are remanding the matter for fresh disposal on this question. However, we are referring to the above feature only for the purpose of indicating the reason which impels us to remand the suit for fresh disposal. A commissioner was appointed in the case and that commissioner has submitted a report attempting

to correlate the suit properties with the title deeds produced by the plaintiff. The appellants herein filed objection to the commissioner's report and there is not a whisper in the judgment of the learned Subordinate Judge about the objections of the appellants. Further, even the commissioner was not examined as a witness before the Court. Under these circumstances, we are clearly of the opinion that issue No. 6 regarding title of the temple to the suit properties has been disposed of summarily in a most unsatisfactory manner. In view of these, we are forced to allow this appeal on this point and remand the matter for fresh disposal by the trial Court. We make it absolutely clear that the scope of the fresh trial will be confined only to issue No. 6 and the trial Court will not be free to consider any other point. On this issue No. 6, the parties will be at liberty to adduce fresh evidence, if they so desire.

13. Under these circumstances, the appeal is allowed in part and the judgment and decree of the learned Subordinate Judge are set aside in so far as the conclusion of the learned Subordinate Judge on issue No. 6 is concerned and the suit is remanded for fresh disposal on that issue. Since we are setting aside the finding of the learned Subordinate Judge on issue No. 6 dealing with title, it is needless to point out that the finding and the decree with regard to mesne profits will also have to be set aside and are set aside and any decree with regard to mesne profits will ultimately depend upon the finding to be rendered by the trial Court on the question of title. The Court-fee paid on the memorandum of appeal will be refunded to the appellants and the parties will bear their respective costs in this appeal.

14. The suit was instituted *in forma pauperis* and since the learned Subordinate Judge decreed the suit, he has directed the defendants to pay the Court-fee due to the Government on the plaint. Since we have rejected the case of the appellants on other points except with regard title, this direction of the learned Subordinate Judge with regard to Court-fee payable on the plaint will stand.

15. The suit was originally on the file of Sub-Court, Ramanathapuram at Madurai. But, for the sake of administrative convenience, it was transferred to Sivaganga and disposed of by the learned Subordinate Judge, Sivaganga. It is now represented to us that all the parties are living within the jurisdiction of the Subordinate Judge of Ramanathapuram at Madurai and that it will be in the interests of all parties if the trial of the suit is done by the Subordinate Judge, Ramanathapuram at Madurai. We agree with the above submission and direct that the suit on remand will be tried by the learned Subordinate Judge, Ramanthapuram at Madurai.

R.S.P. —— *Appeal partly allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—*K. Veeraswami, C. J. and A. Varadarajan, J.*

The Government of Tamil Nadu represented by the Secretary to the Government, Rural Development and Local Administration Department, Madras-9 and others .. *Appellants**

v.

R. Gopalaswamy, Chairman, Panchayat Union Council, Sivakasi, Ramanathapuram District and another .. *Respondents.*

Tamil Nadu Panchayats Act (*XXXV of* 1958), *sections* 149, 155—*Panchayat Union Council—Inspector's order under section* 149—*Subsequent order by Government under section* 155 (1) —*Council to be dissolved—Validity —Difference between section* 149 (1) *and section* 155 (1) —*Intention of Government to dissolve Council.*

Acting under section 149 of the Tamil Nadu Panchayats Act, the Director of Rural Development who was also an Inspector under the Panchayats Act authorised the Panchayat Union Commissioner, Sivakasi to perform the duties of Chairman of the Panchayat Union Council. Subsequently, the Government, acting

* W.A.No. 133 of 1973. 5th *September*, 1973.

under section 155, directed the dissolution of the Council. The order of the Government was challenged on the ground that it was conflicting with the earlier order.

Held, there was no conflict between the two orders. Each of them had been passed in exercise of the power conferred by the appropriate provision of the Act. The only difference between section 149 (1) and section 155 (1) is that the latter provision speaks of " persistently makes default in performance of duties." The power of the Government under section 155 in relation to persistent default in performing duties is not identical with that under section 149 (2) which authorises an Inspector to appoint a person to perform the duties. Evidently, section 155 (1) contemplates a case where the persistent default in performing duties on the part of the Union Council calls for not merely the appointment of a person to perform the duties but also the dissolution of the Union Council itself if the facts justified it. [*Paras.* 2 *and* 3.]

Though the ground for action may be more or less the same in section 149 (1) and (2) and also section 155 (1) except for the difference that in the latter case the default should be persistent, the remedies provided by the two sections are entirely different. [*Para.* 4.].

The intention of the order of the Government under section 155 (1) was not to remove the Chairman but was to dissolve the Panchayat Union Council. [*Para.* 5.]

Appeal under section 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramaprasada Rao, dated 11th July, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2523 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order of the Secretary to the Government, Rural Development and Local Administration, Government of Tamil Nadu made in G. O. Ms. No. 486, R. D. and L.A. dated, 16th March, 1973 and quash the same.

Government Pleader (S. Mohan) for Appellant.

E. Padmanabhan for Respondent.

The Order of the Court was pronounced by

K. Veeraswami, C. J.—An order of the State Government, G. O. Ms. No. 485, Rural Development and Local Administration, dated 16th March, 1973 was quashed by Ramaprasada Rao, J., on the view that it was in direct conflict with the proceedings of the Director of Rural Development who is also an Inspector for purposes of the Tamil Nadu Panchayats Act. That order of the Director was dated 28th January, 1973, and it said that the Collector of Ramanathapuram reported that the meetings of the Sivakasi Panchayat Union Council, scheduled to be held on 1st January, 6th March, 4th May and 3rd July, 1972, were not held due to non-co-operation among the councillors and that as a result the development schemes entrusted to the Panchayat Union could not be carried out on account of the faction in the Council. Thereafter, after giving notice to the Panchayat Union Council under section 149 (1) and not being satisfied with the explanation offered, in exercise, of the power conferred under section 149 (2) of the Act, he authorised the Pachayat Union Commissioner, Sivakasi, to perform the duties mentioned and meet the relative expenses. It appears that due to the realignment of political affiliations, 31 councillers opposed the chairman, while 19 supported him, with the result that every resolution brought before the council was defeated. The order of the Government, which has been quashed by the learned Judge, shows that one of the materials it had before it was a letter of the Collector of Ramanathapuram, dated 27th February, 1973. We find from the order that it was brought to the notice of the Government that Sivakasi Panchayat Union Council was not functioning satisfactorily and effectively and the administration of the Panchayat Union Council had been paralysed because of the deadlock in the administration created by the members of the Panchayat Union Council. The order also notices the fact that 34 members of the council met and passed a resolution supporting the dissolution of the council with reference to the show-cause notice issued by the Government under section 155. On a con-

sideration of the entire material, the Government directed that the Sivakasi Panchayat Union Council be dissolved with effect from 17th March, 1973, and be re-constituted with effect from 17th June, 1973. The consequential notification was accordingly made. Ramaprasada Rao, J., thought that because the ground for making the two orders, one of the Director, Rural Development, and the other of the Government, is identical, there was a conflict and since the Government Order had not even taken notice of the order of the Director of Rural Development the order of the Government should be quashed.

2. We are not able to agree with that view. It is true that the ground for either of the orders is identical. But it does not follow from it that there was any conflict between the two orders. Each of them has been passed in exercise of the power conferred by the appropriate provision of the Act.

3. Section 149 empowers the Inspector to appoint some person to perform the duty of the Panchayat, if at any time it appears to him that a panchayat president or executive authority or a panchayat union council or its chairman or Commissioner has made default in performing the duty imposed by or under the Act. An Inspector, of course, should make such appointment only after he had fixed a period by an order of his for the performance of such duty and there was still default in the performance of that duty. In the instant case, the order which the Director in his capacity as Inspector, made was well within the purview of section 149 (2). But it may be noticed that the power of the Inspector is confined only to make an appointment of a person to perform the duty. If a more drastic solution is required in any contingency in addition to the appointment of a person to perform the duty, the Inspector will have power to make any order in that regard. But section 155 gives the power to the Government to dissolve a panchayat union council in certain circumstances which may be identical with the circumstances which would entitle an Inspector to act under section 149 (2). The only difference between section 149 (1) and section 155 (1) is that the latter provision speaks of persistently makes default in performance of duties. The power of the Government under section 155 in relation to persistent default in performing duties is not identical with that under section 149 (2) which authorises, as we said, an Inspector to appoint a person to perform the duties. Evidently, section 155 (1) contemplates a case where the persistent default in performing duties on the part of the union council calls for not merely the appointment of a person to perform the duties but also the dissolution of the union council itself if the facts justified it.

4. In the instant case, the party position in the council is such that as many as 34 members were opposed to the chairman and every resolution which was brought before the council was defeated. In that situation, it is but to be expected that dissolution of the Panchayat Union Council was also called for, because of the deadlock in the administration caused by the persistent default made by the Panchayat Union Council. Though the ground for action may be more or less the same in section 149 (1) and (2) and also section 155 (1), except for the difference that in the latter case the default should be persistent, the remedies provided by the two sections are entirely different.

5. It is contended for the first respondent that the effect of the Government Order is to remove the Chairman under section 155 (1), a result which could be properly arrived at only by following the provisions relating to a no-confidence motion against the Chairman. We are unable to accept this contention as correct. The intention of the order of the Government under section 155 (1) was not to remove the Chairman but was to dissolve the Panchayat Union Council. It may be that because of the peculiar provisions, when the panchayat union council is reconstituted, the presidents of the panchayats would, because of their ex-officio position become, automatically members of the reconstituted council and the reconstituted council will have to elect a chairman. But it does not follow that when there is a dissolution and by its effect, the chairman goes out of office, the order of dissolution should be construed also as

one of removal of the chairman. That simply is neither the intention of the order nor the effect of section 155 (1) (*a*) of the Act. No one would say from the order of dissolution that it was one removing the chairman from the office. If he went out of office, it was not because he was removed by any no-confidence motion brought against him under the rules, but because the panchayat union council itself was dissolved.

6. We are told that of late this peculiar device has been adopted by the Panchayat Union Councils to get rid of unwanted chairmen by a devious process and that therefore we should not lend support to this. We are afraid that it is not for the Court to meet the situation but it is for the Legislature. We can only look into the provisions of the Act and interpret their language.

7. In that view of the matter, we allow the appeal with costs against the first respondent. Counsel's fee Rs. 100.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, J.*

C. Muthuvel Pillai .. *Appellant**

v.

Hazarath Syed Shamian Sakkab Saheb Kadhiri Thaikkal represented by Trustee Syed Ismath Batcha Saheb .. *Respondent.*

Suit for recovery of possession of site—Superstructure put up by lessee—Appointment of Commission to fix price—Validity—Civil Procedure Code, section 151, *can be invoked—Price fixed on report—Price fixed does not affect pecuniary jurisdiction of Court—Munsif's Court—Direction in decree to purchase—Whether in relation to subject-matter in suit—Registration Act, section* 17 (2) (vi)—*No need to register decree.*

Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari Act (XXX of 1963) *section* 13 *—Scope —Inapplicable where landlord is owner of vacant site.*

In a suit for recovery of possession of a site, the fixing of the price of the superstructure put up on the site by the lessee is only a consequential remedy to the relief prayed for in the suit. Simply because the price of the superstructure, which is not the subject-matter of the suit as it is, is over and above Rs. 5,000 the matter is not beyond the jurisdiction of the District Munsif's Court and the Munsif has jurisdiction to order delivery of possession. [*Para.* 10.]

The fixing of the price of the superstructure on the suit property by appointing a Commissioner, is only consequential to the main relief claimed in the suit and is not opposed to the procedures laid down in the Civil Procedure Code. The Court has jurisdiction to do so and section 151 can be invoked for the purpose. [*Para.* 12.]

A direction in the decree to the plaintiff to purchase the superstructure on the suit site is one in relation to the subject-matter of the proceeding in the main suit for recovery of possession within the meaning of section 17 (2) (*vi*) of the Registration Act and as such no registration of the decree is needed. [*Paras.* 17 & 18.]

The provisions of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act will apply only to a person who is the owner of both site and building ; section 13 does not preclude execution of a decree for possession where the landlord is the owner of a vacant. site. [*Para* 19.]

Cases referred to :—

Official Trustee, West Bengal v. *Sachindra*, (1969) 2 S.C.J. 123 : (1969) 3 S.C.R. 92 : A.I.R. 1969 S.C. 823 ; *Padam San* v. *State of U.P.*, (1961) 2 S.C.J. 79 : (1961) M.L.J. (Crl.) 405: (1961) 2 M.L.J. (S.C.) 22 : (1961) 2 An.W.R. (S.C.) 22 : A.I.R. 1961 S.C. 218 ; *Rajagopala Chettiar* v. *H.R.E. Board, Madras*, 66 M.L.J. 43 : 147 I.C. 614 : I.L.R. (1934) 57 Mad. 271 ; A.I.R. 1934 Mad. 103 (2) : *Nandasam* v. *Balakrishnamma*, (1939) 50 L.W. 541 : A. I.R. 1939 Mad. 897 ; *Ramanuja Naicker* v. *Seethalakshmi*, (1958) 2 M.L.J. 512 ; *Kannayya Chetti* v. *Venkata Narasayya*, I.L.R. (1917) 40 Mad. 1 : 32 M.L.J. 221 : 39 I.C. 439 ; *Govindaswami Mudaliar* v. *Rasu Mudaliar*, I.L.R. (1935) 58 Mad. 781 : 68 M.L.J. 41 : A.I.R. 1935 Mad. 232 : 156 I.C. 791 ; *Pappu Reddiar* v. *Amaravathi*

* A.A.A.O. No. 90 of 1972. 6*th April*, 1973.

Ammal, (1971) 1 M.L.J. 225 : 83 L.W. 795 : A.I.R. 1971 Mad. 182 ; *Ramachandra Naidu* v. *Parameswaran Nair*, (1970) 1 M.L.J. 578 ; *M. Ramaswami Pillai* v. *The Azzarath Syed Sha Mian Sakkar Khadiri Thaikkal, Thanjavur by trustee S.S. Peeran Sahib*, C.M.A. No. 23 of 1972 ; *Silambani Sri Chidambara Vinayagar Devasthanam, Devakottai* v. *Duraiswami Nadar and others*, (1971) 1 M.L.J. 278; *P.S. Veerappa Chettiar* v. *Sri Bava Oushadheswara Swami Devasthanam by its Executive Officer, Tiruthuraipoondi*, S.A. No. 369 of 1966.

Appeal against the order of the Court of the Subordinate Judge of Thanjavur dated 4th March, 1972 and made in C.M. A. No. 116 of 1971 (E.P. No. 31 of 1969 in O.S. No. 30 of 1962 on the file of the Court of the District Munsif of Thanjavur.

P. Raghaviah and *V. P. Ganesan*, for Appellant.

S. Kothandarama Nayanar, for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in O.S. No. 30 of 1962, on the file of the District Munsif's Court, Thanjavur, is the appellant in this civil miscellaneous second appeal. The second defendant is no other than the mother of the first defendant. The plaintiff, Hazarat Saiyed Shah Mian Saheb Kadiri Thaikkal, represented by its trustee Ismat Pasha Sahib, laid the suit for recovery of vacant possession of the suit land from defendants 1 and 2 after removing the superstructure put up thereon by them, alleging, *inter alia*, that the plaintiff is the owner of the site described in the plaint schedule, that one Muthayya Pillai and the second defendant executed a rent deed in favour of the then trustee, C.S. Peeran Sahib, on 20th December, 1934, for occupation thereof, agreeing to pay a monthly rent of Rs. 5, that the period fixed was five years, that although the period fixed in the lease deed expired long ago, defendants 1 and 2 are continuing in possession thereof, that they have sub-let the property in favour of the third defendant, that defendants 1 and 2 put up a superstructure on the site and that under the terms of the lease deed, the lessees have to surrender vacant possession of the site after removing the superstructure. The plaintiff further averred that defendants 1 and 2 are in arrears of rent to the extent of Rs. 315 till 1st September 1961, that in spite of notice, defendants 1 and 2 have not surrendered possession, that the plaintiff is entitled to recover possession of the leasehold property after the removal of the superstructure and to a decree for the arrears of rent now claimed and for future rent till delivery of possession. The plaintiff therefore prayed for a decree for recovery of possession of the suit property (site) through process of Court after removal of the superstructure put up thereon by defendants 1 and 2 and for rents.

2. Pending disposal of the suit, the parties entered into a compromise, and I.A. No. 564 of 1963 was filed under Order 23, R. 3, Civil Procedure Code on 28th June, 1963. The said compromise filed into the Court, *inter alia* stated as follows :

> " 1. The parties agree that a Commissioner may be appointed to make a local investigation of the suit property to assess the value at present of the superstructure that stands on the suit site and to report the same to this Hon'ble Court.
>
> 2. The parties further agree that on this Hon'ble Court enquiring into the Commissioner's report and fixing the price, the plaintiff is to buy the superstructure from defendants 1 and 2 at a price to be fixed by this Court after deducting the rent due from them for the site till the time of purchase. Defendants 1 and 2 may receive the amount to be deposited after delivery of the possession. "

3. On 6th August, 1963, the District Munsif passed a decree in the suit in and by which he directed the plaintiff to purchase the suit building mentioned in the plaint and described in the plaint-schedule and to deposit into Court a sum of Rs. 6,000 being the sale consideration on or before 6th February, 1964.

4. From the above narration, it is seen that in the compromise filed by the parties there is a definite statement as regards delivery of possession of the property. In the suit itself the second defendant filed O.P. No. 20 of 1963 for purchase of the site and the same was rejected. The second defendant, aggrieved by the decision of the District Munsif, preferred an appeal. The

lower appellate Court fixed the value of Rs. 10,000. The plaintiff preferred a second appeal in S.A. No. 1658 of 1964. The High Court gave a decree as follows:-

> " The parties agree that the appellant (plaintiff) may deposit Rs. 2,000 more in addition to the sum of Rs. 6,000 he has already deposited within 2 months from this date and the respondent will give possession immediately on deposit. On failure to do so execution can be taken out immediately and proceedings taken. The respondents 1, 4 and 5 can withdraw the sum of Rs. 6,000 already deposited as well as Rs. 2,000 to be deposited only after giving possession. Out of this amount the rents upto date would naturally be deducted. The parties will bear their own costs "

5. On 7th January, 1969, the plaintiff applied in E.P. No. 31 of 1969, under order XXI Rule 35 C.P.C. for delivery of property as per the decree. The same was allowed and delivery was ordered by the District Munsif on 23rd October, 1970. The first defendant took the matter in appeal in C.M.A. No. 116 of 1971 before the Subordinate Judge, Thanjavur.

6. Pending that civil miscellaneous appeal, the first defendant filed C.M.P. Nos. 12552 and 12553 of 1970 in the aforesaid second appeal (S.A. No. 1658 of 1964) praying, in the former petition, to bring out in the judgment in second appeal that the appellant and the fifth respondent alone compromised and that the first respondent remained *ex-parte* and to confine the terms of the decree to the quantum of valuation of the superstructure on the suit site and deleting the other clauses, and, in the latter petition, to stay all further proceedings in E.P. No. 31 of 1969 pending disposal of C.M.P. No. 12552 of 1970. Ramamurti, J., by order dated 13th November, 1970, passed the following order on the two petitions.

> " There is no substance in the petitions. The petitioner did not care to participate even though he was duly served in the second appeal both in his own capacity as the first respondent as well as in his capacity as the legal representative of his deceased mother. The judgment also indicates that the compromise was merely the acceptance of the suggestion of the Court in the course of the hearing, to the effect that the compensation amount might be fixed at Rs. 8,000. It is clear that the petitioner herein is taking advantage of the fact that in the preamble portion of the judgment there is some reference to the agreement between the parties. That apart, the petitioner who did not participate in all these proceedings, is not entitled to file this petition. It is clear that he has been set up by the other members of the family to rake up the question over again after having obtained an advantage of the amount being fixed at Rs. 8,000 by this Court (High Court).
>
> For all these reasons, the application for amendment and the application for stay, are dismissed. No costs. "

Thus, it is clear that the appellant herein has got a decision of this Court in the above C.M.Ps. that the order passed in O.S. No. 30 of 1962 is a decree though the Court had taken certain suggestions made in the compromise memorandum filed into Court.

7. The suit was one for delivery of the site. The District Munsif took into consideration the compromise memorandum filed by the parties and gave a decree in favour of the plaintiff for purchase of the superstructure also at a cost of Rs. 6,000. The lower appellate Court fixed the price of the superstructure at Rs. 10,000. The High Court fixed the price at Rs. 8,000. Even assuming that the trial Court has given a decree only for purchasing the superstructure, the High Court's decree makes it clear that possession will be given by the appellant herein and the others immediately on deposit of the sum of Rs. 8,000. As long as an appeal is pending the entire matter is at large and the finality attachable to a decree comes in only on the ultimate disposal of the appeal. In this case, the finality of the decree was only after the disposal of S.A. No. 1658 of 1964 and as such it has to be taken that the decree, as it stands, makes it clear that the appellant has to hand over possession as soon as the plaintiff deposits the sum of Rs. 8,000 being the value of the superstructure standing on the suit site.

8. C.M.A. No. 116 of 1971, preferred by the first defendant, came to be dismis-

sed by the Subordinate Judge, Thanjavur. Hence the civil miscellaneous second appeal by him.

9. Thiru V.P. Ganesan, the learned Counsel for the appellant, contended as follows :

(i) The entire proceeding of the trial Court in O.S. No. 30 of 1962 is null and void subsequent to the filing of the agreement in I.A. No. 564 of 1963, signed by the plaintiff and defendants 1 and 2.

(ii) the trial Court and the appellate Courts have no jurisdiction to fix the price for the superstructure on the basis of the agreement filed by the parties.

(iii) Section 151 C.P. Code, will not apply in the matter of fixing of the value of the superstructure and of passing a decree of this nature.

(iv) The decree is not executable since it is only declaratory.

(v) The District Munsif's Court which fixed the price at Rs. 6,000 in respect of the superstructure, had no jurisdiction to do so, as its pecuniary jurisdiction is only up to Rs. 5,000. The decree of the District Munsif is a nullity and hence the appeal and the second appeal therefrom are nullities. Further the judgment of the District Munsif is no judgment as per Grder 20, r. 4, (2) Civil Procedure Code, and as such there is no 'decree' as contemplated in section 2 (2), Civil Procedure Code.

(vi) The judgment and decree in the second appeal giving the relief of possession are without jurisdiction, as there is no relief prayed for in the plaint in respect of the superstructure.

(vii) The judgment and decree of the High Court in second appeal are not in accordance with Order 41, r. 34, Civil Procedure Code as no new point can be raised at the stage of second appeal.

(viii) Since there is a relief granted in respect of immovable property the decree ought to have been registered under the Indian Registration Act.

(ix) The respondent (plaintiff) cannot recover possession inasmuch as the land has been taken over by the Government under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act XXX of 1963.

10. Thiru Kothandarama Nainar, the learned Counsel appearing for the respondent *inter alia* submitted that the decree passed finally by the High Court in second appeal is executable, that the executing Court cannot go beyond the decree, that the High Court has every jurisdiction to pass a decree which is in accordance with the plaint filed by the respondent-plaintiff, that the compromise memorandum filed in I.A. No. 564 of 1963 and also the decree of the High Court definitely direct delivery of possession by the appellant herein, that the decree to purchase the superstructure is only consequential to the main relief prayed for and as such the same need not be registered, that Tamil Nadu Act XXX of 1963 will not affect the prayer for possession made by the respondent and that there is no question of law involved in this civil miscellaneous second appeal for entertaining the same. The learned Counsel further contended that his client has deposited the amount directed to be deposited by the High Court into the trial Court and that a joint patta has also been granted in favour of the respondent.

Various decisions were cited at the Bar for the positions taken by the respective Counsel. I have already discussed, in the opening paragraphs, the facts of the case and about the finality given in the case by reason of the judgment in S.A. No. 1658 of 1964.

Official Trustee, W.B. v. *Sachindra*[1], states:

"It is plain that if the learned Judge had no jurisdiction to pass the order in question then the order is null and void. It is equally plain that if he had jurisdiction to pronounce on the plea put forward before him the fact that he made an incorrect order or even an illegal order cannot affect its validity."

It cannot be said that the Court had no jurisdiction to pass the order as prayed for in the plaint. The fixing of the value of the superstructure is only a consequential remedy to the relief prayed for by the plaintiff in the suit. As such, I do not

1. (1969) 2 S.C.J. 123: (1969) 3 S.C.R. 92: A.I.R. 1969 S.C. 823.

think the matter is beyond the pecuniary jurisdiction of the District Munsif's Court simply because the price of the superstructure, which is not the subject-matter of the suit as it is, is over and above Rs. 5,000. The District Munsif had jurisdiction to order eviction. The fact that he has directed the plaintiff to purchase the superstructure at a price of Rs. 6,000 cannot be held as invalidating the decree for want of pecuniary jurisdiction. The omission on the part of the District Munsif to specifically mention the right of the plaintiff to get possession of the site cannot in any way affect the jurisdiction of the Court. Even the said remedy prayed for by the plaintiff has been made clear in the compromise memo filed by the parties and also by the judgment and decree granted at the second appellate stage. In the order on the amendment petition, aforementioned Ramamurti, J., made it clear that there is no compromise decree but the District Munsif passed a regular decree and that there is no need to amend the decree in the second appeal. Thus, the decree passed by the High Court in the second appeal has become final, and there was neither a review petition nor any appeal to the Supreme Court against the same. It is too late in the day to state that the trial Court itself had no jurisdiction to pass the decree, at the stage of execution.

12. In *Padam San* v. *State of U.P.*[1], the Supreme Court has considered the scope of section 151, Civil Procedure Code in clear terms. The contention of the learned Counsel for the appellant that the appointment of a Commissioner to value the superstructure on the suit property is beyond the powers of the Court, cannot stand. The fixing of the price by appointing a Commissioner is only consequential to the main relief claimed in the suit, and is not at all in conflict with any of the procedures laid down in the Code of Civil Procedure. As such, the Court has jurisdiction to do the same. It is too much for the appellant to state that the powers of the Court under section 151, Civil Procedure Code, cannot be invoked on the facts of the present case. I am of the view that the Court is perfectly within its jurisdiction, and in the interest of justice and also to give a finality to the litigation, it has gone into the question of fixing the price of the superstructure which is only consequential to the main relief prayed for by the plaintiff. Even the consequential relief was given by the Court on the foot of the agreement entered into between the parties concerned.

1. (1961) 2 S.C.J. 79 : (1961) M.L.J. (Crl.) 405: (1961) 2 M.L.J. (S.C.) 22: (1961) 2 An.W.R. (S.C.) 22: A.I.R. 1961 S.C. 218.

13. Thiru V.P. Ganesan, the learned Counsel for the appellant cited the decisions in *Rajagopala Chettiar* v. *H.R.E. Board, Madras*[1] and *Nandasam* v. *Balakrishnamma*[2], for the position that the order sought to be executed is not a 'decree'. I do not think there is any difficulty in accepting the proposition propounded in the above two decisions. The definition of 'decree' in section 2 (2), Civil Procedure Code will clearly govern the judgment and decree given by the trial Court and those by the High Court in second appeal in this case.

14. No doubt, the decision in *Ramanuja Naicker* v. *Seethalakshmi*[3], cited by the learned Counsel for the appellant states that if a decree only gives a declaration of right and is not executable in the form it is drafted, the proper course in such cases is to apply to the Court to make suitable modifications to make the decree in form executable. But as far as the present case on hand is concerned, the High Court has passed a decree in S.A. No. 1658 of 1964 and the same is executable as such. It is also clear that the decree passed by the High Court is in accordance with the prayer in the plaint.

15. The other decisions cited by the learned Counsel for the appellant for the proposition that it is only a declaratory decree and as such registration is required, that the decrees of the appellate Courts have been passed without proper pleadings and issues and that the initial jurisdiction of the trial Court is lacking are not necessary to be discussed, inasmuch as the facts of the case are completely different from those in the decisions referred to by the learned Counsel.

16. In *Kannayya Chetti* v. *Venkata Narasayya*[4], a Full Bench of this Court has held:

1. 66 M.L.J. 43 : 147 I.C. 914: I.L.R. (1934) 57 Mad. 271: A.I.R. 1934 Mad. 103 (2).
2. (1939) 50 L.W. 541: A.I.R. 1939 Mad. 897.
3. (1958) 2 M.L.J. 512.
4. (1917) I.L.R. 40 Mad. 1: 32 M.L.J. 221: 39 I.C. 439.

"We are, therefore, of opinion that in every case when the Court is seized of jurisdiction it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit or by the precise ascertainment of the value in cases which do not admit of such ascertainment at the time of institution, except when the plaint is allowed to be amended, and that is not really an exception."

In the case on hand, the District Munsif who took up the case on his file and decided the matter had jurisdiction at the inception and the price fixed for the superstructure was only consequential to, and not the main relief in the suit.

17. There is no question of registration of the decree passed in the case. Section 17 (2) (vi) of the Indian Registration Act states:

"Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to—

any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding."

This has been clarified in the decision in *Govindaswami Mudaliar* v. *Rasu Mudaliar*[1], Venkatasubba Rao, J., has held in that decision.

"I am therefore of the opinion that the property in question was the "subject-matter" of a "proceeding" within section 17 (2) (vi) and that the consent order (which as I have shown, is also, in the circumstances, a consent decree) is excepted from registration."

The decision above cited can be taken as an analogy in relation to the case on hand. The direction to purchase is only in relation to the subject-matter of the proceeding in the main suit, within section 17 (2) (vi) of the Registration Act, and as such no registration of the decree is needed.

18. Thiru Kothandarama Nainar, the learned Counsel for the respondent also brought to my notice a Bench decision in *Pappu Reddiar* v. *Amaravathi Ammal*[1] and *Ramachandra Naidu* v. *Parameswaran Nair*[2] for the propostition that the words "subject-matter of the suit" in section 17 (2) (vi) of the Registration Act cannot be read as subject-matter of the plaint nor even as subject-matter in dispute in the suit or proceeding and that if the consent decree or order in the suit or proceeding covered the property although it was not in the plaint or in dispute, such property constituting, as it does, an inseparable part of the consideration for the compromise, may well be regarded as the subject-matter of the suit and this is because the decree passed on the basis of the compromise cannot stand without that property. I am in complete agreement with those two decisions and I find that no registration of the decree is required in the present case, as contended by the learned counsel for the appellant.

19. As regards non-executability of the decree by virtue of section 13 of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari Act,(XXX of 1953 Thiru Kothandarama Nainar submitted that apart from the fact that his client has been declared to have title to the site, he has obtained a patta also in his favour subsequently. The question as to whether after the coming into force of Act XXX of 1963 a landlord who is the owner of a vacant site can get possession of the same from the tenant, came up for decision in *M. Ramaswami Pillai* v. *The Hazzarath Syed Sha Mian Sakkar Khadiri Thaikkal Thajavur by Trustee S.S. Peeran Sahib*[3] before this Court. Venkataraman, J., relying on the decision in *Silambani Sri Chidambara Vinayagar Devasthanam, Devakottai* v. *Duraiswami Nadar and others*[4] and also the one (*P.S. Veerappa Cheetiar* v. *Sri Bava Oushaedheswara Swami Devasthanam by its executive Officer, Tiruthuraipoondi*[5], held that the provisions of the Act will apply only to that person who is the owner of both the building and the site. As such, the contention of the learned Counsel for the appellant that no execution can be taken in view

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1. (1935) I.L.R. 58 Mad. 781 at 786 : 68 M.L.J. 41: A.I.R. 1935 Mad. 232.

1. (1971) 1 M.L.J. 225: 83 L.W. 795: A.I.R. 1971 Mad. 182.
2. (1970) 1 M.L.J. 578.
3. C.M.A. No. 22 of 1972.
4. (1971) 1 M.L.J. 278.
5. S.A. No. 369 of 1966.

of section 13 of Tamil Nadu Act XXX of 1963 is of no avail.

20. The Courts below have correctly appraised the matter and have given an order for possession. Taking into consideration the facts of the case and the fact that no error of law has been committed by the Courts below, it is not possible to interfere with the findings of the Courts below.

21. In the circumstances, the civil miscellaneous second appeal is dismissed. No costs. Time to vacate three months. No leave.

P.S.P. ——— *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. S. Venkataraman, S. Maharajan and B.S. Somasundaram, JJ.*

Sessions Judge, Tirunelveli .. *Appellant**

v.

Perumal and another .. *Accused.*

and

The Additional Sessions Judge, Tirunelveli .. *Referring Officer.*

(A) *Madras Children Act (IV of* 1920), *sections* 4, 36 *and* 38-*B—Criminal Procedure Code (V of* 1898), *sections* 1 (2), 29-*B and* 193—*Madras Children Rules* (1940), *rule* 3 —*Impact of section* 29-*B, Criminal Procedure Code on Children Act—Juvenile Court if has jurisdiction to try any offence including offences punishable with death—Juvenile accused along with an adult for offence punishable with death or imprisonment for life—Proper forum for trial of juvenile and adult—Procedure to be followed in such trial.*

(B) *Madras Juvenile Court Rules* (1930), *rule* 8—*Validity.*

The impact of section 29-B of the Code of Criminal Procedure on the Madras Children Act, 1920, can be summarised thus: (1) Before the enactment of section 29-B of the Criminal Procedure Code a Juvenile Court constituted under section 36 of the Madras Children Act could try any offence whatsoever including an offence punishable with death or transportation for life; (2) So far as the other Courts mentioned in section 4 were concerned their jurisdiction was delimited by Schedule II of the Code of Criminal Procedure; in other words, they could try offences which they could try under the Schedule ; (3) All those Courts could exercise powers under the Children Act, 1920 with the possible exception that in the case of a Magistrate of the first or second class mentioned in clause (*g*) of section 4, the State Government may confer only some of the powers under the Act ; (4) Those powers could be exercised whether the case came before the Courts originally or in appeal; (5) As a result of section 29-B of the Criminal Procedure Code, the jurisdiction of the Magistrates mentioned in section 4 of the Madras Children Act became enlarged to the extent indicated in section 29-B of the Code ; in other words, they could try any offence other than one punishable with death or transportation for life, which could previously be tried only by a Court of Session, if the accused was aged less than fifteen years; (6) But, if the accused was between fifteen and sixteen years, their jurisdiction would still be limited by Schedule II of the Criminal Procedure Code. [*Para.* 22.]

This position continued even after the amendment in 1958 (Act XXXVII of 1958) substituting the word "imprisonment" for "transportation" and also raising the upper limit of age of a young person from sixteen to eighteen. [*Para.* 23.]

It follows that *Anthony* v. *State*, (1960) M.W.N. (Crl.) 59: A.I.R. 1960 Mad. 308 in so far as it laid down that a Juvenile Court established under section 36 of the Madras Children Act could try any offence whatsoever, including an offence punishable with death or imprisonment for life and that that position was not in any way affected by section 29-B of the Code of Criminal Procedure, is good law. [*Para.* 24.]

In a case where a juvenile is accused of having participated in a serious offence punishable with death or imprisonment for life along with an adult, it is desirable to avoid a conflict of decisions by ensuring that the juvenile also is tried by the Court

* Cri.Mis. P. Nos. 3957 of 1972 and 996 of 1973. *19th July*, 1973.

of Session which would try the case against the adult. [*Para.* 25.]

Rule 8 of the Madras Juvenile Court Rules, 1930 would seem to stand in the way of the Court of Session trying a case against a juvenile. But rule 8 as it stands, is opposed to section 4 of the Act and is consequently *ultra vires*. This means that where a juvenile is accused along with an adult of having committed an offence punishable with death or imprisonment for life, there would be no impediment to the Court of Session trying such a case against the juvenile subject to the provisions of section 38-B of the Madras Children Act forbidding a joint trial of the adult and the juvenile. Because of the prohibition against joint trial, the Court of Sessions will have to try the adult accused separately from the juvenile accused; that is to say, there will be two separate trials. The Sessions Judge should not pronounce judgment in either case till the trials in both the cases are over. [*Para.* 26.]

Reading section 1 (2) of the Code of Criminal Procedure along with rule 3 of the Madras Children Rules, 1940 it seems that section 193 of the Code of Criminal Procedure will not affect the special form of procedure prescribed by rule 3 of the Madras Children Rules, 1940. It follows that there need not be an order of committal to the Court of Session and the Court of Session can straightaway take cognizance of a case triable by it, in so far as a juvenile is concerned. [*Para.* 31.]

Where a juvenile alone is accused of an offence, the case against him will, as hitherto, be tried by the Juvenile Court established under section 36 (1) of the Act even if the offence is one punishable with death or impriosnment for life. But, where he is accused of having committed an offence punishable with death or imprisonment for life along with an adult accused, it is desirable to avoid a conflict of decisions by the juvenile Court and the Court of Session. To achieve this purpose, the police officer will file the charge-sheet against the adult accused in the Court of the concerned Sub-Magistrate empowered under Chapter XVIII of the Code of Criminal Procedure to hold an enquiry and the charge-sheet against the juvenile in the Court of Session. The Court of Session should hold up the trial of the juvenile till the enquiry by the Magistrate is over. If an order of committal is made in re pect of the adult accused the Court of Session will try the case against the adult accused separately from the case against the juvenile accused, one after the other. In respect of the juvenile accused, the summons case procedure should be adopted. Judgment should not be pronounced in either case till both the trials are over. [*Para.* 33.]

If the enquiry against the adult accused results in an order of discharge, the Court of Session may straightaway try the juvenile accused. But, if he wants, be may wait for a short time to see whether any revision petition is filed against the order of discharge. [*Para.* 34.]

Cases referred to—

Keralan, In re, (1972) L.W. (Crl.) 195 : *Anthony* v. *State* , (1960) M.W.N. 261: (1960) M.W.N. (Crl.) 59: (1960) Crl.L. J. 927: A.I.R. 1960 Mad. 308 ; *Lakshi Sahu* v. *Emperor*, A.I.R. 1932 Cal. 487; *Lakshi Narayan Das* v. *The Province of Bihar*, (1949) F.C.R. 693: A.I.R. 1950 F.C. 59: (1950) S.C.J. 32: (1950) 1 M.L. J. 760; *Emperor* v. *Lakshi Sahu*, (1932) I.L. R. 59 Cal. 856: A.I.R. 1932 Cal. 482; *Sibbu Munilal* v. *State*, A.I.R. 1968 M.P. 97 (F.B.); *Ramachandra Misra* v. *President, District Board, Ganjam*, A.I.R. 1951 Orissa 1; *Maji Appalaswamy*, In re, (1932) M.W. N. 1076; *Emperor* v. *Natvarlal Nagindas*, 33 Bom.L.R. 312: A.I.R. 1931 Bom. 198; *Emperor* v. *Jalal Dhondibhal*, 36 Bom.L.R. 435: A.I.R. 1934 Bom. 211; *Emperor* v. *Onkarnath*, I.L.R. 1937 All. 101: A.I.R. 1936 All. 675.

Crl.M.P. No. 3957 *of* 1972:—

Case referred for the Orders of the High Court by the Sessions Judge, Triunelveli in his letter dated 13th October, 1972-. D. No. 7183 to transfer Juvenile Case No. 264 of 1972 now pending before the Juvenile Court, Tirunelveli to the file of the Court of Sessions, Tirunelveli for trial in accordance with the provisions of the Madras Children Act and the rules framed thereunder.

Crl.M.P.No. 996 *of* 1973:—

Case referred for the Orders of the High Court by the Additional Assistant Sessions

Judge, Tirunelveli in his letter dated 23rd November, 1972—D. No. 3304 to transfer Juvenile Case No. 239 of 1972 on the file of the Juvenile Court (DistrictMagistrate), Tirunelveli to the Court of Session, Tirunelveli for disposal along with Sessions Case No. 119 of 1972 on his file.

The Advocate-General, assisted by the Public Prosecutor, for State.

B. Sriramulu, amicus curiae under rule 242 of the Criminal Rules of Practice and Orders, 1958 for the Accused.

The Judgment of the Court was delivered by

Venkataraman, J.—This is a reference by the learned Sessions Judge of Tirunelveli to transfer J.C. No. 264 of 1972 pending against juvenile Pandi, from the file of the Juvenile Court, Tirunelveli, to the Court of Session. The circumstances under which the reference has been made are these. A charge-sheet was filed by the Police in the Court of the Sub-Magistrate, Nanguneri, against two persons, one Perumal and his son, the said Pandi, on the allegation that Pandi committed an offence of murder (section 302 of the Indian Penal Code) and that the father abetted the commission of the said offence and was punishable under section 302 read with section 34 or section 302 read with section 109, Indian Penal Code. At the time of the filing of the charge-sheet Pandi was less than eighteen years age and was a young person as defined in section 3 of the Madras Children Act, 1920. The case against him was split up, and the case against the father was taken on file by the Sub-Magistrate, Nanguneri, as P.R.C. No. 21 of 1972. Then a separate charge-sheet was filed against Pandi in the Juvenile Court, Tirunelveli, and it was taken on file as J.C. No. 264 of 1972. The trial of that case is pending in that Court. In respect of Perumal, the Sub-Magistrate, Nanguneri, held a preliminary enquiry under Chapter XVIII of the Code of Criminal Procedure, and committed Perumal to take his trial in the Court of Session for an offence under section 302 read with section 34, Indian Penal Code. The case was taken on file by the Court of Session as S.C. No. 112 of 1972. Charges under section 302 read with section 34 or in the alternative under section 302 read with section 109, Indian Penal Code were framed. The trial of that case is over and the case is pending delivery of judgment.

2. It was at this stage the learned Sessions Judge made this reference to transfer J.C. No. 264 of 1972 from the file of the Juvenile Court to the Court of Session to be tried by the Sessions Iudge, before pronouncing judgment in S.C. No. 112 of 1972. He has adopted this course on the basis of the judgment of Maharajan, J., dated 22nd June, 1972 in Crl.R.C. No. 444 of 1972—*Keralan* In re[1], wherein the learned Judge observed:

> "Where a plurality of persons jointly take part in an offence and some of them happen to be adults and others happen to be juveniles, it is eminently desirable and certainly permissible that the same forum tries all the accused, adult and juvenile, not jointly but separately, trying the adult accused in accordance with the provisions of the Code of Criminal Procedure and the juvenile accused in accordance with the provisions of the Madras Children Act, and the rules framed thereunder. Such a procedure will, besides avoiding conflict of decisions in respect of the same occurrence, instil in the minds of the accused the confidence that even-handed justice is rendered to them at least in the matter of appreciation of the evidence, without any discrimination being shown merely on the ground of age."

3. In Crl. M.P. No. 996 of 1973 a similar reference has been made by the Assistant Sessions Judge of Tirunelveli to transfer J.C. No. 239 of 1972 from the file of the Juvenile Court to the Court of Session to be tried by the Assistant Sessions Judge who tries S.C. No. 119 of 1972. There it was alleged that two adults committed offences under sections 450 and 376, Indian Penal Code and a juvenile abetted the offences. The Sub-Inspector of Police filed a charge-sheet against the adults in the Court of the Sub-Magistrate, Tenkasi. The Sub-Magistrate took it on file as P.R. C. No. 10 of 1972 and committed the accused to the Court of Session. The case was taken on file as S.C. No. 119 of 1972 and was made over to the Assistant Sessions Judge for trial. The Sub-Inspector of Police filed a separate charge sheet under sections 450 and 376, Indian Penal Code, against the

1. (1972) L.W. (Crl.) 195.

juvenile in the Juvenile Court and it was taken on file as J.C. No. 239 of 1972. The trial is yet to start both before the Assistant Sessions Judge and the Juvenile Court. It was at that stage that the reference was made by the Assistant Sessions Judge to transfer J.C. No. 239 of 1972 to be tried by the same Judge who tried S.C. No. 119 of 1972. The reference has been made on the basis of the judgment of Maharajan, J., in Crl.R.C. No. 444 of 1972. That reference came in the administrative side before Kailasam, J., and the Hon'ble the Chief Justice. Kailasam, J., felt some doubt about the views of Maharajan, J., extracted above, and expressed himself as follows:—

> "The decision in Crl.R.C. No. 444 of 1972 requires reconsideration. The view expressed that the adult and the juvenile could be tried by the same Court, not jointly but separately, is not free from difficulty. If, in the earlier case, the Court finds the accused guilty, the subsequent trial of the juvenile or the adult accused may cause an apprehension, that the Judge had taken a view on the earlier case and his view will be coloured in the subsequent case. The observation of the learned Judge in paragraph 4 (of flag A) may not be in accordance with section 38-B (1). An Assistant Sessions Judge tries cases on committal only. He may be a Court under the Children Act to hear an appeal, but the Court empowered to try is the Juvenile Court and, when that Court has jurisdiction under the Act, how can the Assistant Session Judge be empowered to try the case as summons case? In view of there being a judicial decision of the High Court, it is better the matter is not disposed of on the administrative side, but placed before a Bench for orders."

4. The Hon'ble the Chief Justice concurred. Accordingly that reference was posted before a Bench consisting of Maharajan, J., and myself. Similarly, when Crl. M.P. No. 3957 of 1972 (relating to J.C. No. 264 of 1972) came up before Kailasam, J., he directed it to be posted before a Bench. That was also posted before us (Maharajan, J. and myself).

5. Maharajan, J. and myself heard the matter and decided to refer the matter to a Full Bench. I shall now have to explain the reason for this course. But, before doing so, it will be necessary to refer briefly to the relevant provisions of the Madras Children Act, 1920 (which will hereafter be referred to as the Act) and some prior decisions of this Court. Broadly speaking, the Act deals with a child (below the age of 14 years) and a young person (between fourteen and eighteen years). A youthful offender has been defined as a person who has been convicted of an offence punishable with imprisonment and who at the time of such conviction was under the age of eighteen years. Section 22 prohibits the penalty of death or imprisonment, though in suitable cases imprisonment may be awarded. The Act (section 26) permits a fine on the youthful offender or his parent and contemplates (Act XXIII) the youthful offender being sent to the Senior Approved School where necessary training will be given to make him or her a useful citizen. The Act also provides for vagrant children, but we are not concerned with those provisions now. The Act (section 36) contemplates the establishment of separate Courts, called Juvenile Courts, for the hearing of charges against children or young persons, and provides (by section 4) that the powers exercisable under the Act can also be exercised by some of the ordinary Courts established under the Criminal Procedure Code. Section 38-B prohibits the joint trial of an adult and a juvenile. Section 44 empowers the State Government to make rules. Section 4 in particular states:

> "The powers conferred on Courts by this Act shall be exercised only by (*a*) the High Court (*b*), a Court of Session, (*c*) a District Magistrate, (*d*) a Sub-Divisional Magistrate, (*e*) salaried Presidency Magistrate, (*f*) any Juvenile Court constituted under section 36 and (*g*) any Magistrate of the first or second class specially authorised by the State Government to exercise all or any of such powers,
>
> and may be exercised by such Courts whether the case comes before them *originally* or on appeal."

6. In R.T. No. 92 of 1959 dated 29th October, 1959, three persons had been convicted by the Sessions Judge on a charge of murder in furtherance of their common intention. The second accused

was a lad of about fourteen years. The Bench (Ramaswami and Ananthanarayanan, JJ.) held that, in view of section 4 (*see* the word "originally" italicised by me) the Sessions Judge continued to have jurisdiction over the juvenile, and further held that in that particular case no prejudice had been caused by the joint trial, particularly, since the final order in respect of the juvenile was a discretion that he should be detained in the Senior Approved School, Chingleput.

7. The above decision is not reported. The same learned Judges held, a few days later, on 6th November, 1959, in *Anthony* v. *State*[1], that a Juvenile Court established under section 36 of the Act had jurisdiction to try and convict a juvenile of an offence under section 376, Indian Penal Code (rape), which would otherwise be triable exclusively by the Court of Session, under Schedule II of the Code of Criminal Procedure. The appeal was against the conviction of the juvenile who had been directed to be detained in the Senior Approved School, Chingleput, for a period of three years, under the provisions of the Act.

8. The argument of the Counsel for the juvenile was based on section 29-B of the Code of Criminal Procedure and the relevant portion of the decision reads thus:

> "The more important question is whether the Juvenile Court could try such an offence at all which is exclusively triable by the Court of Session according to Schedule II and the general scheme of the Code of Criminal Procedure. In this context learned Counsel for the appellant draws our attention to section 29-B of the Code of Criminal Procedure, which is in the following terms:
>
> 'Any offence, other than one punishable with death or imprisonment for life, committed by any person who at the date when he appears before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the State Government to exercise the powers conferred by section 8, sub-section (1) of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.'

The argument of learned Counsel (Mr. K. Narayanaswamy) as he then was is that section 29-B was enacted when the Reformatory Schools Act, 1897, was being replaced by other legislation such as the Madras Children Act or similar measures or when such superseding laws were in contemplation. He states that, in consequence the Central Legislature laid it down that all such enactments shall operate only within this restricted scope, namely, that juvenile offenders may be tried by such special Courts or Magistrates for any offence "other than one punishable with death or imprisonment for life." Those words have to be read disjunctively and the implication is that no Juvenile Court, nor Special Magistrate, can try a juvenile for an offence punishable with imprisonment for life, such as an offence of rape. The Juvenile Court had, therefore, no jurisdiction in this case. Learned Counsel also refers to a decision of a Bench of the Calcutta High Court, *Lakshi Sahu* v. *Emperor*[1], where, with reference to an offence punishable under section 304, Indian Penal Code it was held that section 29-B took away the jurisdiction of a specially empowered Magistrate to try a juvenile offender.

The learned Advocate-General has addressed arguments upon this aspect and drawn our attention, in particular, to section 1, sub-clause (2), Criminal Procedure Code, section 6, Criminal Procedure Code and to the provisions of the Government of India Act, 1919, (9 and 10, Geo. 5) and the Schedules thereto, which originally governed the power of a State Legislature to enact a measure like the Madras Children Act (IV of 1920). It is important to note that under section 1 (2), Criminal Pro-

1. (1960) M.W.N. 261 : (1960) M.W.N. (Crl.) 59 : (1960) Cr.L.J. 927 : A.I.R. 1960 Mad. 308.

1. A.I.R. 1932 Cal. 487.

cedure Code nothing in the Criminal Procedure Code,

'shall affect any special or local law now in force, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.'

"Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of criminal Courts in India........'

This juxtaposition of section 1 (2), Criminal Procedure Code and section 6, Criminal Procedure Code taken along with the Government of India Act, 1919, and the Schedules thereto, clearly imply that the State Legislature had power to make a law for establishing Juvenile Courts to try all juvenile accused of any offence whatsoever. Hence, section 29-B does not take away the power of the State Legislature to enact a measure like the Madras Children Act (IV of 1920). The power of the Juvenile Court to try all juvenile offenders for any offence, including murder, is therefore, incontrovertible. The learned Advocate-General has sought to further sustain this argument upon the authority of *Lakshi Narayan Das* v. *The Province of Bihar*[1]. The learned Judges observed therein:

"The concurrent list is not forbidden field to the Provincial Legislature, and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of section 107 of the Government of India Act...... Section 1 (2) of the Criminal Procedure Code expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for time being in force'.

We accept the arguments of the learned Advocate-General that, upon the grounds set forth already, it was competent to enact the provisions of the Madras Children Act (Act IV of 1920), and that, having regard to the juxtaposition of section 1 (2), Criminal Procedure Code and section 6, Criminal Procedure Code. Section 29-B, Criminal Procedure Code, does not by any necessary implication, take away the power of a Juvenile Court established by law to try a juvenile offender even for an offence punishable with death or imprisonment for life."

The argument of the Counsel as extracted in the above decision left me with the impression that the Madras Children Act was enacted after section 29-B of the Code of Criminal Procedure. On this impression I felt that section 29-B permitted a Juvenile Court to be established under a special local law to try any offence other than one punishable with death or imprisonment for life and that, if the special local law wanted to confer jurisdiction on the Juvenile Court even to try an offence punishable with death or imprisonment for life it (the special law) would have specifically stated so. On this approach, I felt that the provisions of the Madras Children Act did not expressly confer jurisdiction on the Juvenile Court to try an offence punishable with death and that consequently the decision in *Anthony* v. *State*[1], might have to be overruled; Maharajan, J., was inclined to agree with me. Thereupon my Lord the Chief Justice was pleased to constitute a Full Bench, consisting of Maharajan, J., Somasundaram, J., and myself.

9. It was only at the time of arguments before the Full Bench, the learned Public Prosecutor brought to our attention the all important fact that the Madras Children Act had been enacted earlier than section 29-B of the Code of Criminal Procedure. The Madras Children Act came into force on 29th June, 1920, the date on which it was published in the *Fort St. George Gazette*. Section 29-B of the Code of Criminal Procedure was inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923). Act XVIII of 1923 was published in the *Gazette of India* on 14th April. 1923. Section 164 of Act XVIII of 1923 stated:

"This Act shall come into force on such date as the Governor-General in-Council may, by notificaion in the *Gazette of India* appoint."

1. (1949) F.C.R. 693-708 : A.I.R. 1950 F.C. 59 : 1950 S.C.J. 32 : (1950) 1 M.L.J. 760.

1. (1960) M.W.N. (Cr.) 59 : A.I.R. 1960 Mad. 308.

The decision in *Emperor* v. *Lakhi Sahu*[1], states that section 29-B of the Code of Criminal Procedure, came into force on 1st September 1923. Thus the Madras Children Act had come into force on 29th June, 1920 and section 29-B of the Code of Criminal Procedure came into force only on 1st September, 1923.

10. Before considering the impact of section 29-B of the Code of Criminal Procedure on the provisions of the Madras Children Act, 1920, it is all important to find out the true construction of the Madras Children Act, 1920, as it stood between 29th June, 1920 and 1st September, 1923, when alone section 29-B of the Code of Criminal Procedure came into force. In what follows immediately I am confining myself to that construction. It may be remembered that at that time there was the punishment of transportation (for life or a shorter term). Under the definition of the Madras Children Act, as it was originally enacted, "youthful offender" meant "any person who has been convicted of an offenee punishable with transportation or imprisonment and who at the time of such conviction was under the age of sixteen years." As a result of the amending Act XXVI of 1955 (Central) transporation for life was replaced by imprisonment for life and transportation for a shorter term was altogether abolished except in cases where the sentence had already been passed before 1955, when it was deemed to be imprisonment for the same period. The amendment and its effect has been discussed in *Sibbu Munilal* v. *State*[2]. Certain consequential amendments in the Madras Children Act were effected by Madras Act XXVIII of 1958 and the words "transportation or imprisonment" which originally occurred in the definition of youthful offender were replaced by the simple word "imprisonment". I am now confining myself to the definition of youthful offender as it stood before the amendment in 1958, that is to say, in its original form as it was introduced in 1920, though the amendment effected in 1958 would not make any difference. Since the definition referred only to an offence punishable with transportation or imprisonment, it would seem to exclude an offence punishable with death, like section 302, Indian Penal Code. Similarly section 23 read:

> "23. (1) Where any person who in the opinion of the Court before which he is charged is twelve years of age but less than sixteen years of age, is convicted of an offence punishable with transportation or imprisonment, the Court may in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a senior certified school."

Sub-section (2) also dealt with only an offence punishable with transportation or imprisonment. On account of these, provisions there was room to think that the Madras Children Act meant to deal with an offence punishable at the most with transportation or imprisonment and did not deal with an offence providing a penalty higher than transportation for life such as the penalty of death, for instance, it did not deal with an offence of murder (section 302, Indian Penal Code) punishable with death (transportation for life was the alternative sentence). The question was rather intriguing and was therefore..........referred by the State Government to the Advocate-General (who was then Sir Alladi Krishnaswami Iyer). It is necessary to reproduce in full the reference of the Government and the opinion of the Advocate-General:

I

(*G.O.* 1175, *Home Department, dated* 30*th June*, 1936).

(Reference of the Government)

> "The question has been raised as to whether a Juvenile Court constituted under the Madras Children Act, 1920, is competent to try a murder case falling under section 302 of the Indian Penal Code which is triable exclusively by a Sessions Court. It is observed that in section 3 (3) of the Madras Children Act a 'youthful offender' is defined as 'any person who has been convicted of an offence punishable with transportation or imprisonment' and that section 23 which empowers a Juvenile Court to deal with charges against a child or young person refers only to an offence punishable with transportation or imprisonment, but not with death.

1. (1932) I.L.R. 59 Cal. 856 : A.I.R. 1932 Cal. 482.
2. A.I.R. 1968 M.P. 97 (F.B.).

In the absence of any specific reference in the sections quoted above to young persons convicted of offences punishable with death, it may be contended that Juvenile Courts cannot take cognizance of such cases.

On the other hand, the following arguments may be advanced in support of the view that Juvenile Courts can take cognizance of offences falling under section 302 of the Indian Penal Code:

(*i*) The language employed in section 36 (1) being general in terms seems to be comprehensive enough to include all charges against children or young persons.

(*ii*) Section 23 of the Act does not seem to restrict the scope of section 36.

(*iii*) As the punishment of transportation can also be awarded under section 302 of the Indian Penal Code, an offence under that section can be said to be included within the scope of section 23 of the Children Act.

(*iv*) Section 27 (1), which is intended for a case where a child or young person is convicted of an offence of so serious a nature that the Court is of opinion that no punishment under the Act will be sufficient, may be said to contemplate cases of offences punishable with death.

The Advocate-General is requested to offer his opinion on the point raised".

II.

(Opinion of the Advocate-General).

"On an examination of the various provisions of the Madras Children Act referred to in the memorandum and having regard to the generality of the expression 'offence' in sections 18 and 21, and of the language of section 36 and the non-exclusion of any particular class of offences from the purview of the jurisdiction of the Courts referred to in section 36, I am of opinion that an offence punishable with death is not excluded from the jurisdiction of a Juvenile Court. The fact that a general provision like section 22 providing that 'notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death' finds a place in the Madras Children Act strengthens one's conclusion that an offence punishable with death is not outside the jurisdiction of the Court established under section 36.

"While the use of the expression 'an offence punishable with transportation or imprisonment' in the various sections of the Act and the omission of any reference to an offence punishable with death may no doubt create some difficulty, it must be taken, in view of the other considerations adverted to above, that the expression 'an offence punishable with transportation' does not exclude the offence of murder. In one sense murder is also an offence punishable with transportation; it does not cease to be an offence punishable with transportation because there is the alternative punishment of death provided for it in the Indian Penal Code."

11. The opinion of that eminent Advocate-General is entitled to the greatest weight and, most respectfully, I adopt that opinion. In addition to the reasons given by him, I would give two reasons; firstly, that, if the Madras Children Act did not intend to deal with an offence punishable with death, we should expect a positive provision to that effect and further stating that in respect of such an offence the ordinary Code of Criminal Procedure would continue to apply; and, secondly, that we should prefer a construction which would avoid a *lacuna* in the Act, in the sense that it did not intend to deal with an offence punishable with death. Unless there is anything in the Act compelling us to hold otherwise, we should avoid an interpretation which would produce such a *lacuna*. There are, however, no such compelling words. At this stage I may refer to some words in sections 20 and 44 of the Act, which might, on a superficial construction, appear to indicate a contrary view. Section 20 enacts:

"A Court, on remanding or committing for trial a child or young person who is not released on bail, shall order him to be detained in the prescribed manner".

Section 44 states:

"(1) The State Government may make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing, such rules may be made with regard to—

(3) the detention of children and young persons under arrest or remand or committed for trial".

On a superficial reading it might be felt that the words "committing for trial" which occur in section 20 and the corresponding words 'committed for trial' which occur in section 44 (1) and (2) (*q*) indicate a committal for trial to the Court of Session by a Magistrate duly empowered to hold the preliminary enquiry under Chapter XVIII of the Code of Criminal Procedure and that it follows from this that a case of murder punishable with death has to be tried *solely* by the Court of Session after the child or young person is committed for trial to that Court. But, on a closer reading of section 20, it would be clear that the words were not intended to have such a meaning. It may be noted that section 20 occurs immediately after sections 18 and 19. Section 18 (briefly) states that, where a person apparently under the age of eighteen years is arrested on a charge of a non-bailable offence, he shall be informed, as soon as may be, of the grounds of his arrest and, unless he is released on bail under sub-section (2), shall be produced before the nearest Magistrate within a period of twenty-four hours. Sub-section (2) thereof says that the police officer shall release him on bail unless for reasons to be recorded in writing he believes that such release would defeat the ends of justice or would bring the juvenile into association with any reputed criminal. Section 19 contemplates that, when a vagrant child or girl likely to be seduced or arrested on a charge of prostitution is brought before a Court, the Court shall, pending enquiry or trial, make an order placing such person in such custody as may be prescribed. Then follows section 20. It would be proper to construe section 20 in the light of the circumstance that it immediately follows sections 18 and 19. From this point of view, two constructions are possible. The first is that the words "on remanding" may connote a stage where a police officer has arrested and forwarded a young person to the Court and it is not yet known whether a charge-sheet would be filed. The words "committing for trial" may denote a stage where a charge-sheet has been filed and therefore the trial is sure to follow. The second possible construction is that the words "on remanding" refer to proceedings under the Act where a mere enquiry, as distinct from a trial, is held, for instance, under section 29 or section 36-H of the Act, whereas the words "committing for trial" refer to those proceedings where that young person is to be tried. In either view, it would not be proper to construe the words "committing for trial" as refe - ing to a procedure of committal to the Court of section under Chapter XVIII of the Code of Criminal Procedure. The context entirely forbids such a construction. In this connection it is not impermissible to refer to the marginal heading in section 20 itself which says "Remand or committal to custody". In other words, it is committal to custody and not committal to the Court of Session. Section 44 (1) and (2) and (*q*) should also bear the same interpretation. I looked up the Statement of Objects and Reasons, the Report of the Select Committee, and the Debate in the Madras Legislative Council with reference to the provisions corresponding to sections 18, 19 and 20. I find that thay agree with the interpretation placed by me and do not at all suggest, even remotely, that the words "committing for trial" were meant to refer to the procedure of committal under Chapter XVIII of the Code of Criminal Procedure. The Statement of Objects and reasons, with reference to clauses 18, 19 and 20 of the Madras Children Bill, 1917, finds place at page 1156 of Part IV of the Fort St. George Gazette, dated 18th December, 1917, the Report of the Select Committee is at pages 1213-1216, Part IV of the Fort St. George Gazette, dated 26th August, 1919, and the proceedings of the Council are at page 695, Part IV of the Fort St. George Gazette, dated 15th March, 1920. In the Statement of Objects and Reasons in that Bill, with reference to clause 18 it is stated:

"Clause 18 provides for the release of a youthful offender on bail after arrest at the discretion of the officer in charge of the police station. Clause 117 of the Bill to amend the Criminal Procedure Code now before the Government of

India gives a Court this power, if the accused is a minor".

With reference to clauses 19 and 20, it is stated:

"The object of these clauses is to prevent a youthful offender from being detained in prison after arrest or on remand. Rules laying down the procedure to be adopted in such cases will be made."

Clause 20, as it was originally enacted, read:

"A Court, on remanding or committing for trial a child or young person, who is not released on bail, may, instead of committing him to prison, order him to be detained in the prescribed manner for the period for which he is remanded".

This was altered by the Select Committee. The debate in the Council also shows that it did not deal with the question of committal for trial to the Court of Session under Chapter XVIII of the Code of Criminal Procedure. Leaving out sections 20 and 44 (1) and (2) (*q*), there is nothing else in the Act to compel us to hold that an offence punishable with death was meant to be excluded from the purview of the Madras Children Act.

12. At this stage it is necessary to point out there is a Full Bench decision of the Madhya Pradesh High Court in *Sibbu Munilal* v. *State of Madhya Pradesh*[1], taking a contrary view. It was construing section 4 of the Reformatory Schools Act, 1897. As locally amended, it ran thus.

"4. In this Act, unless there is anything repugnant in the subject or context (*a*) 'youthful offender' means any boy who has been convicted of any offence punishable with transportation or imprisonment or who has been sentenced to imprisonment under section 123 of the Code of Criminal Procedure, 1898, and who at the time of such conviction or sentence was under the age of sixteen years".

13. It was held that it would not include an offence punishable with death, the reason being that, since the definition referred to an offence punishable with transportation or imprisonment, it meant an offence punishable at the highest with transportation or imprisonment and would not take in an offence punishable with the penalty of death which is the most severe penalty and higher than the penalty of transportation or imprisonment. No doubt, there is some force in that line of reasoning. But, I think, for the reasons expressed by Sir Alladi Krishnaswami Iyer, and further supplemented by me, the better view is that the Madras Children Act, 1920, was intended to apply also to an offence punishable with death.

14. Though this is the main consideration to be borne in mind before considering the impact of section 29-B of the Code of Criminal Procedure, which was introduced in 1923, on the provisions of the Madras Children Act, 1920, as it originally stood, it is necessary to consider briefly how, having intended to deal with all offences including an offence punishable with death, the Madras Children Act, 1920, sought to confer jurisdiction on the various Courts mentioned in section 4 of the Act.

Section 4 of the Act, as it was enacted in 1920, read:

"The powers conferred on Courts by this Act shall be exercised only by (*a*) the High Court, (*b*) a Court of Session, (*c*) a District Magistrate, (*d*) a Sub-Divisional Magistrate, (*e*) salaried Presidency Magistrate, (*f*) any Juvenile Court constituted under section 36, and (*g*) any Magistrate of the first or second class specially authorised by the Local Government** to exercise all or any of such powers: and may be exercised by such Courts whether the case comes before them originally or on appeal".

(**The words "Local Government" were replaced by the words "Provincial Government" by the Adaptation Order of 1937, and the words "State Government" were substituted for the words "Provincial Government" by the Adaptation Order, 1950, but these changes make no difference, so far as the present discussion is concerned.) Section 36 (1) so far as material, read:

"The Local Government may provide for the establishment in any district of

1. A.I.R. 1968 M.P. 97 (F.B.).

one or more separate Courts for the hearing of charges against children or young persons...."

(The words "Local Government" were replaced by the words "Provincial Government" in 1937, and they were again altered as "State Government", in 1950.) The point to be noted is that section 4 merely stated that the powers conferred on the Courts by that Act shall be exercised by the Courts mentioned therein. It did not confer any power of trial as such on the Courts enumerated in that section. For the power of trial we have to look elsewhere. So far as Courts, other than the Juvenile Court constituted under section 36, were concerned, the power of trial was evidently meant to be regulated by the Code of Criminal Procedure. So far as the Juvenile Court constituted under section 36 of the Act was concerned, section 36 itself was meant to confer the power of trial because the wording was "The Local Government may provide for the establishment in any district of one or more separate Courts for the *hearing* of charges against children or young persons" and that was supplemented by section 4 and section 23, which meant that the Juvenile Court constituted under section 36 could try cases (that was what was meant by "for the hearing of charges") and convict or acquit a child or young person, and, in the event of a conviction might exercise the powers conferred under the Act (like sending the child or young person to the Senior Approved School, etc.). The further point to be noted is that, so far as the Courts, other than the Juvenile Court, were concerned, section 4 did not say that each of those Courts could try any offence whatsoever. It would follow that these Courts would be governed by Schedule II of the Code of Criminal Procedure on the question of what kind of offence any particular Court could try. Thus, a District Magistrate or a Sub-Divisional Magistrate, being only a Magistrate of the first class, could try only such offences as were enumerated in Schedule II of the Code of Criminal Procedure as triable by a Magistrate of the First Class. They could not try for instance, a case triable exclusively by the Court of Session; *i.e.*, they could not try a case of murder (section 302, Indian Penal Code) or rape (section 376, Indian Penal Code). This limitation, however, did not apply to the Juvenile Court constituted under section 36, because no such limitation was imposed either under section 4 or under section 36. Thus the position was that, while the Juvenile Court could try any offence whatsoever, including an offence punishable with death, the other Courts could try only cases within the delimitation indicated by Schedule II of the Code of Criminal Procedure. I shall have to revert to this question later.

15. Having indicated the true construction of the Madras Children Act, 1920, as it stood before section 29-B of the Code of Criminal Procedure was enacted, we are now in a position to consider the impact of section 29-B of the Code of Criminal Procedure on the Madras Children Act as it then stood. Section 29-B of the Code of Criminal Procedure read as follows:

"Any offence, other than one punishable with death or transportation for life, committed by any person who, at the date when he appears or is brought before the Court, is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate or by any Magistrate specially empowered by the local Government to exercise the powers conferred by section 8 sub-section (1) of the Reformatory Schools Act, 1897, or in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby".

In construing this section, it is necessary to know what the law was before it was enacted. Section 8 of the Reformatory Schools Act, which was in force, and in so far as it was relevant, read:

"8. (1) Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the Court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the Court may, subject to any rules made by the local Government direct that, instead of undergoing his sentence, he shall be sent to such a school and be

there detained which shall be not less than three or more than seven years.

(2) The powers so conferred on the Court by this section shall be exercised only by (*a*) the High Court, (*b*) a Court of Session, (*c*) a District Magistrate, and (*d*) any Magistrate specially empowered by the local Government in this behalf, and may be exercised by such Courts whether the case comes before them originally or on appeal".

16. It will be seen that there was no provision in the Reformatory Schools Act, 1897, similar to section 36 (1) of the Madras Children Act, 1920, providing for the constitution of any separate Juvenile Court, as it is called (which usually consists of a salaried Magistrate and two Honorary Magistrates, including ladies). It will be noted that section 8 did not deal with the jurisdiction of the Courts mentioned in sub-section (2) thereof, *viz.*, the High Court, the Court of Session, the District Magistrate or any Magistrate, to try offences. That question was meant to be dealt with by Schedule II of the Code of Criminal Procedure. What section 8 (1) enacted was that, after conviction, the competent Court might sentence the youthful offender to transportation or imprisonment, but direct that, instead of undergoing the sentence, he shall be sent to the prescribed school to be detained there for a period between three and seven years. It also seems that not all the States had passed special Acts like the Madras Children Act; 1920. So far as I am able to gather, besides Madras, only one other State, *viz.*, Bengal, had passed such a special Act, namely, the Bengal Children Act, 1922. I get this inferentially from the Madras Children (Amendment) Bill, XVIII of 1936, page 298 of the Fort St. George Gazette, dated 18th August, 1936) since only those two special local Acts are mentioned there. It was in this state of things power was conferred by section 29-B of the Code of Criminal Procedure, on Courts other than a Court of Session, like a District Magistrate or a Chief Presidency Magistrate, to try an offence other than one punishable with death or transportation for life which could previously have been tried only by the Court of Session. Take for instance section 312, Indian Penal Code, (miscarriage) punishable with imprisonment for three years ordinarily (and for seven years, if the woman be quick with he child). It was exclusively triable only by the Court of Session. It is not an offence punishable with death or transportation for life, and such a case could, after the enactment of section 29-B of the Code of Criminal Procedure, be tried by the District Magistrate or the Chief Presidency Magistrate or a Magistrate empowered under section 8 of the Reformatory Schools Act or the corresponding section of the Local Act, if the accused was under the age of fifteen years. In this way section 29-B of the Code of Criminal Procedure was an enabling provision and it is interesting to note that that was the object with which it was introduced as disclosed in the Statement of Objects and Reasons:

"The existing procedure of committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as under-trial prisoners, although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court, the sentence or order eventually passed being often incommensurate with the time and energy expended upon a commital and sessions trial. It is therefore proposed that offences of children, unless so serious as to be punishable with death or transportation for life, should be triable by a District Magistrate, a Chief Presidency Magistrate, or by any Magistrate specially empowered to exercise the powers conferred by section 8, sub-section (1) of the Reformatory Schools Act, 1897".

17. Construed this way, section 29-B of the Code of Criminal Procedure would not in any way conflict with the provisions of the Madras Children Act, 1920, but would enlarge the powers of the Courts other than the Court of Session mentioned in section 4 of the Madras Children Act, 1920, if the accused was under the age of fifteen years. In concrete terms, as a result of section 29-B of the Code of Criminal Procedure, a District Magistrate, a Sub-Divisional Magistrate, a salaried Presidency Magistrate and any Magistrate of the first or second class specially empowered by the Local Government

(now State Government) to exercise all or any of the powers conferred by the Madras Children Act, 1920, might try any offence other than one punishable with death of transportation for life, if the accused was under fifteen. This meant that those Courts could try for instance, an offence under section 312, Indian Penal Code, which otherwise would have been triable only by the Court of Session under Schedule II of the Code of Criminal Procedure. So far as the Juvenile Court constituted under section 36 (1) of the Madras Children Act is concerned, it was not necessary to invoke section 29-B of the Code of Criminal Procedure, because, as we have seen, the Juvenile Court could try any offence whatsoever, including one punishable with death or transportation for life. The question, however, is whether section 29-B of the Code of Criminal Procedure should be construed not merely as an enabling provision, but also as a provision which by necessary implication meant that in respect cf an offence punishable with death or transportation for life, it repealed the provisions of the earlier Act, the Madras Children Act, 1920; in other words, whether it means that in respect of an offence punishable with death or transportation for life even the Juvenile Court constituted under section 36 (1) of the Act could no longer try such offences, even though prior to the enactment of section 29-B of the Code of Criminal Procedure, the Juvenile Court could have tried any offence whatsoever. Stated this way, it seems to me that there could be only one answer, that section 29-B of the Code of Criminal Procedure could not possibly be construed in any such manner. If it was meant to have any such repealing effect, it should have been specially stated. Certainly the law does not favour an implied repeal. See for instance the decision in *Ramachandra Misra* v. *President, District Board, Ganjam*[1], the decisions cited therein, and the passage from Maxwell quoted there:

> "Repeal by implication is not favoured ......It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statue book or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention, (Maxwell on Interpretation of Statutes, 9th Edition, page 173)."

18. Similarly in Maxwell, Twelfth Edition, at page 191, it is stated:

> "A later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favoured by the Courts........ If therefore earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done".

19. Our attention has not been drawn to any decision, nor have I been able to find any, which has taken the view that section 29-B of the Code of Criminal Procedure must be construed as repealing an earlier local law, like the Madras Children Act, 1920. There is however a decision of a Bench of the Calcutta High Court which needs some examination. It is *Emperor* v *Lakhi Sahu*[1]. In that case a boy of thirteen or fourteen years was produced before one Mr. Mukherji, who had been appointed a Presidency Magistrate to preside over the Central Children Court, Calcutta, on a charge of culpable homicide (section 304, Indian Penal Code) which is normally exclusively triable by a Court of Session. Mr. Mukherji made a reference to the High Court on two points, the first of which was whether the Court over which he was appointed to preside was competent to try cases exclusively triable by the Court of Session. The learned Judges of the High Court quoted section 29-B of the Code of Criminal Procedure and observed:

> "This section authorises the Magistrate in charge of the Central Children Court to try all offences, other than an offence punishable with death or transportation for life, and it, therefore, in my opinion, clearly lays down, by implication, that an offence under section 304 of the Indian Penal Code, which is

1. A.I.R. 1951 Orissa 1.

1. (1932) I.L.R. 59 Cal. 856 : A.I.R. 1932 Cal. 482.

punishable with transportation for life, and which is exclusively triable by the Court of Session, is not to be tried by the Magistrate in charge of the Central Children Court. The answer to the first point referred to us must, therefore, be in the negative".

20. In the above passage reference was made only to section 29-B of the Code of Criminal Procedure and not to any other provision of law, similar to section 36 (1) of the Madras Children Act, 1920. I find from page 298 of the Fort St. George Gazette dated 28th August, 1936, introducing the Madras Children Amendment Bill, XVIII of 1936, that three Acts are quoted for reference, *viz.*, the English Children and Young Persons Act, 1933, the Bengal Children Act, 1922 and the Bombay Children Act, 1924. The Library of the High Court has not been able to supply me with the Bengal Children Act, 1922, and it is not known whether it contained a provision similar to section 36 (1) of the Madras Children Act, 1920. If it contained such a provision, it is not clear why the decision cited has not referred to it; and the authority of the decision would become doubtful, if there was such a provision. If, however, there was no such provision in the Bengal Children Act, 1922, and if the matter had to be decided solely on the wording of section 29-B of the Code of Criminal Procedure, the decision would be right. As it is, the decision cannot be construed as an authority for the proposition that section 29-B of the Code of Criminal Procedure was meant to repeal any earlier local law, dealing with children.

21. On the other hand, there are some decisions, *Maji Appala Swamy*, In re[1], *Emperor* v. *Natvarlal Nagindas*[2], *Emperor* v. *Jalal Dhondibhai*[3] and *Emperor* v. *Onkar Nath*[4], which hold that section 29-B of the Code of Criminal Procedure is only permissive and does not take away the jurisdiction of the Magistrate already existing under Schedule II of the Code of Criminal Procedure. No doubt, they were not direct authorities on the question whether section 29-B of the Code of Criminal Procedure was meant to take away any previously existing jurisdiction under the Madras Children Act, 1920, but, by analogy, they can be construed as authorities on that question as well.

22. The impact of section 29-B of the Code of Criminal Procedure on the Madras Children Act, 1920, can therefore be summarised thus. (1) Before the enactment of section 29-B of the Code of Criminal Procedure, a Juvenile Court constituted under section 36 of the Madras Children Act could try any offence whatsoever including an offence punishable with death or transportation for life; for instance, it could try a case of murder. (2) So far as the other Courts mentioned in section 4 were concerned, their jurisdiction was delimited by Schedule II of the Code of Criminal Procedure; in other words, they could try offences which they could try under the Schedule; (3) All those Courts Could exercise powers under the Children Act, 1920, with the possible exception that in the case of a Magistrate of the first or second class mentioned in clause (*g*) of section 4, the State Government may confer only some of the powers under the Act. (4) Those powers could be exercised whether the case came before the Courts originally or in appeal. (5) As a result of section 29-B of the Code of Criminal Procedure the jurisdiction of the Magistrates mentioned in section 4 of the Madras Children Act, 1920, became enlarged to the extent indicated in section 29-B of the Code of Criminal Procedure; in other words, they could try any offence other than one punishable with death or transportation for life, which could previously be tried only by a Court of Session, if the accused was aged less than fifteen years. (6) But, if the accused was between fifteen and sixteen years, their jurisdiction would still be limited by Schedule II of the Code of Criminal Procedure.

23. This position continued even after the amendment in 1958 (XXXVII of 1958) substituting the word "imprisonment" for "transportation" and also raising the upper limit of age of a young person from sixteen to eighteen.

24. It follows that *Anthony* v. *State*[1], in so far as it laid down that a Juvenile

1. (1932) M.W.N. 1076.
2. 33 Bom.L.R. 312 : A.I.R. 1931 Bom. 198.
3. 36 Bom.L.R. 435: A.I.R. 1934. Mad. 211.
4. I.L.R. (1937) All. 101 : A.I.R. 1936 All. 675.

1. (1960) M.W.N. (Cr.) 59 : A.I.R. 1960 Mad. 308.

Court established under section 36 of the Madras Children Act, 1920, could try any offence whatsoever, including an offence punishable with death or imprisonment for life and that that position was not in any way affected by section 29-B of the Code of Criminal Procedure, is good law.

25. The next question is whether, in a case where a juvenile is accused of having participated in a serious offence punishable with death or imprisonment for life, along with an adult, it is not desirable to avoid a conflict of decisions by ensuring that the juvenile also is tried by the Court of Session which would try the case against the adult. We are firmly of the opinion that the answer must be in the affirmative. In R.T. No. 92 of 1959 dated 29th October, 1959, itself, Ramaswami and Anantanarayanan, JJ. indicated this. It may be recalled that in that case the second accused, who was a lad of about fourteen years, was jointly tried by the Sessions Judge along with the adult accused (accused 1 and 3) on a charge of murder (section 302 read with section 34 Indian Penal Code), though section 38-B of the Madras Children Act, which had been introduced only recently, prohibited a joint trial. The Bench pointed out that, if the juvenile were tried by the Juvenile Court and only the adults by the Court of Session, there would be conflict of decisions and that it was desirable to avoid it. In fact, they went to the extent of saying that it was desirable to have a joint trial, but keeping the juvenile away from the adult accused. Though, of course, that is not permissible in view of the prohibition of joint trial contained in section 38-B, the observations show the necessity for avoiding a conflict of decisions. Further, it is desirable that in a serious case of an offence punishable with death or imprisonment for life, a more experienced Court, like the Court of Session, tries that case against the juvenile as well. There can be no doubt about the jurisdiction of the Court of Session to deal with such a case, as seen from section 4 of the Act which empowers the Courts mentioned therein to exercise the powers under the Act, whether the case comes before them *originaly* or in appeal. (We have under lined the word 'originally'). Somasundaram, J. also by an order dated 22nd March, 1972 in Cr.R.C. No. 1092 of 1971 directed the Sessions Judge to take cognizance of the offence against the juvenile and deal with him separately fiom the adult accused. The same procedure has been indicated by Maharajan, J., in Cr.R.C. No. 444 of 1972, which I have already quoted. My learned brothers continue to have the same opinion. I also fully agree with them on this point.

26. The next question is how this objective is to be achieved. Here Rule 3 of the Madras Juvenile Court Rules, 1930, would seem to stand in the way of the Court of Session trying a case against a juvenile. Those rules have been framed in exercise of the powers conferred by sub-section (1) and clause (*n*) of sub-section (2) of section 44 of the Madras Children Act. Those rules clearly show that they deal exclusively with the Juvenile Court established under section 36 (1) of the Act. In fact, rule 2 defines the Court, for the purpose of these rules as the juvenile Court established under sub-section (1) of section 36. The succeeding rules also proceed on the same basis. Rule 2 says:

> "When a Court has been established in any district, all cases referred to in sub-section (1) of section 36 of the said Act in the whole or any part of that district, as the State Government may from time to time specify, shall be taken before and dealt with by such Court".

Section 44 (3) says that the rules made under that section shall be published in the Official Gazette and on such publication they shall have the same effect as if enacted in the Act. If it is a rule validly made and is not *ultra vires* the Act, it would have the same effect as if enacted in the Act. But the question is whether the rule is valid. Maharajan, J. indicated in Cr.R.C. No. 444 of 1972, that the rule was *ultra vires*, because that rule conferred exclusive jurisdiction on the Juvenile Court (established under section 36 (1) of the Act to deal with all cases referred to in sub-section (1) of section 36, which, as we have seen, includes any offence whatsoever. In other words, rule 8 purports to shut out the original jurisdiction of the Courts other than the Juvenile Court, mentioned in section 4, for example, the High Court, a Court of Session, a District Magistrate

a Subdivisional Magistrate, a salaried Presidency Magistrate. According to rule 8, the Court of Session cannot try a case of murder against a child or young person, a District Magistrate cannot try even a case of simple hurt under section 323 Indian Penal Code, against a child or young person, and so on. Rule 8, as it stands, is opposed to section 4 of the Act and is consequently *ultra vires*. In the form in which it stands, it has to be struck down. But, since it may be desirable to have cases against juveniles tried by the Juvenile Court established under section 36 (1) of the Act as far as possible rule 8 may be amended by introducing the word ' ordinarily ' between the words 'shall' and 'be taken before and dealt with by such Court'. That is to say, the rule can read thus :

> " When a Court has been established in any district, all cases referred to in sub-section (1) of section 36 of the said Act in the whole or any part of that district, as the State Government may from time to time specify, shall ordinarily be taken before and dealt with by such Court."

If the rule is so amended, there will be no conflict between the rule and section 4 and the rule will be valid. In what follows we proceed on the basis that without such an amendment the rule is *ultra vires*. This means that, where a juvenile is accused along with an adult of having committed an offence punishable with death or imprisonment for life, there would be no impediment to the Court of Session trying such a case against the juvenile subject to the provisions of section 38-B of the Madras Children Act forbidding a joint trial of the adult and the juvenile. Because of the prohibition against joint trial, the Court of Sessions will have to try the adult accused separately from the juvenile accused ; that is to say, there will be two separate trials. The Sessions Judge should not pronounce judgment in either case till the trials in both the cases are over. By adopting such a course, the Sessions Judge or the Assistant Sessions Judge will, besides avoiding a conflict of decisions, also avoid any impression which might otherwise be created in the mind of either the adult accused or the juvenile accused that his case has been prejudged by the Judge. This is really what was indicated by Maharajan, J., in Cr.R.C. No. 444 of 1972, already quoted. This would answer the difficulty expressed by Kailasam, J., to the following effect :

> " The view expressed that the adult and the juvenile could be tried by the same Court not jointly but separately is not free from difficulty. If, in the earlier, case, the Court finds the accused guilty the subsequent trial of the juvenile or the adult accused may cause an apprehension that the Judge had taken a view on the earlier case and his view will be coloured in the subsequent case."

27. The next sentence in the remarks of Kailasam, J., is as follows :

> " The observation of the learned Judge in paragraph 4 (of flag A) may not be in accordance with section 38-B (1)."

This has reference to paragraph 4 of the decision in Cr. R. C. No. 444 of 1972. In that case three persons were committed to take their trial before the Court of Sessions for offences under sections 302 of the Indian Penal Code, by the Sub-Magistrate. The second accused was aged less than eighteen years. The Sessions Judge made a reference to quash the committal. In paragraph 4 of his order Maharajan, J., quashed the order of committal so far as the juvenile accused was concerned, and in paragraph 5 upheld the committal of the adult accused. He gives three reasons in paragraph 4 for quashing the order of committal against the juvenile accused. The third reason given is this :

> " In the third place, section 38-B (1) of the Madras Children Act directs that, notwithstanding anything contained in section 239 of the Code of Criminal Procedure, 1898, or any other law for the time being in force, no child or young person shall be charged with, or tried for, any offence together with an adult. In this case the committing Magistrate has charged the second accused, a juvenile, with the offence of murder and simple hurt together with two adult accused and has thereby committed a violation of section 38-B (1) of the Act."

Thus Maharajan, J., held that the procedure adopted by the Sub-Magistrate

was in violation of section 38-B (1) of the Act. We are, therefore, unable to understand, with great respect, what Kailasam, J., meant by the remark; "The observation of the learned Judge in paragraph 4 may not be in accordance with section 38-B (1)."

28. Kailasam, J., then remarks as follows:

> "An Assistant Sessions Judge tries cases on committal only. He may be a Court under the Children Act to hear an appeal, but the Court empowered to try is the Juvenile Court and when that Court has jurisdiction under the Act, how can the Assistant Sessions Judge be empowered to try the case as summons case?"

These remarks will have to be understood with reference to what was indicated by Maharajan, J. After quashing the order of committal of the juvenile accused, and upholding the committal of the adult accused, Maharajan, J., proceeded to point out that *Anthony* v. *State*[1], while holding that it was competent for the Juvenile Court to try a juvenile even for an offence triable exclusively by a Court of Session, did not mean to hold that the Court of Session itself would not have jurisdiction to try a juvenile, Maharajan, J., pointed out that under section 4 of the Madras Children Act, the original jurisdiction of the Court of Session remained unimpaired. He further pointed out that rule 8 which conflicted with section 4 was *ultra vires.* He then indicated the desirability of the same Sessions Judge trying both the case against the adult accused and the case against the juvenile accused, but separately.

29. The effect of the judgment of Maharajan, J., is therefore that the Sessions Judge or the Assistant Sessions Judge can straightaway take the case against the juvenile without any order of committal and try him, but separately from the adult accused. Kailasam, J., in the remarks quoted, questions the validity of the view that a Sessions Judge or an Assistant Sessions Judge can try a case against a juvenile without an order of committal. This is the meaning of the sentence, "an Assistant Sessions Judge tries cases on committal only." Kailasam, J. had evidently in mind section 193 of the Code of Criminal Procedure, which says:

> "(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

30. Before dealing with the question whether section 193 of the Code of Criminal Procedure applies at all, I may point out that learned Judges of this Court, sitting singly, have uniformly proceeded on the view that a Court of Session can take cognizance of an offence against a juvenile without an order of committal. Vide the decision of Krishnaswamy Reddy, J., dated 2nd January, 1967 in Cr. R. C. No. 1440 of 1966, Ravindran (Juvenile)—Petitioner (Accused), the order of Somasundaram, J., dated 21st March, 1972 in Cr. R. C. No. 1092 of 1971, Thamarai and 4 others—petitioners (Accused), the decision of Maharajan, J., in Cr.R. C. No. 444 of 1972—Karalan and others—petitioners (Accused)—and the decision of Somasundaram, J., dated 12th February, 1973 in Cr.R.C. No. 1118 of 1972—Balu-Petitioner (Accused). Krishnaswamy Reddy and Maharajan, JJ., rely on rule 7 of the Madras Juvenile Court Rules, 1930, which says:

> "The procedure laid down in the Code of Criminal Procedure, 1898, for the trial of summons cases shall be observed by the Court in the trial of all cases, whether summons cases or warrant cases."

Krishnaswamy Reddy, J, refers to and relies on the decision in *Anthony* v. *State*[1]. In that case the first question which was considered was whether the Juvenile Court which convicted the youth under section 376 of the Indian Penal Code, was justified in following the summons case procedure as prescribed in rule 7 of the Madras Juvenile Court Rules. The learned Judges answered this question in the

1. (1960) M.W.N. (Cr.) 59 : A.I.R. 1960 Mad. 308.

1. (1960) M.W.N. (Cr.) 59: A.I.R. 1960 Mad. 308.

affirmative. Their reasoning was that under section 4 (*v*) and (*w*) of the Code of Criminal Procedure, there were only two kinds of cases, summons case and warrant case, a warrant case being one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year, and a summons case being one relating to an offence and not being a warrant case. Thus even an offence punishable under section 302 or 376 of the Indian Penal Code has to be technically classified as a warrant case. Therefore rule 7 of the Juvenile Court Rules would take within its ambit even an offence punishable under section 302 or section 376 of the Indian Penal Code. If I may say so with respect, this reasoning is certainly sound, but, as pointed out by Maharajan, J., during the arguments, and as observed already, rule 7 applies only to a Juvenile Court established under section 36 of the Act, because the whole set of rules including rule 7, deals only with a Juvenile Court, established under section 36 of the Act. But, as pointed out by the learned Public Prosecutor, there is a counterpart to rule 7 of the Juvenile Court Rules, in rule 3 of the Madras Children Rules, 1940, which is to the following effect :

"The procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of summons cases shall be followed by the Court in the trial of all cases, whether summons cases or warrant cases :

Provided that in cases where no appeal lies, the procedure prescribed by sections 263 and 265 of the said Code may be followed by a Court outside the Presidency Town."

This rule applies to all the Courts mentioned in section 4 of the Madras Children Act, other than a Juvenile Court established under section 36 of the Act : in particular, it would include a Court of Session. Since it says that the procedure prescribed for the trial of summons cases should be followed, by necessary implication, it means that it dispenses with an enquiry under Chapter XVIII of the Code of Criminal Procedure, enabling the Court of Session to take cognizance even of an offence under section 302 of the Indian Penal Code without an order of committal as a Court of original jurisdiction.

31. The all important question therefore, is whether, in view of rule 3 of the Madras Children Rules, 1940, it can be said that section 193 of the Code of Criminal Procedure is not applicable. The answer to this question depends upon the wording of section 1 (2) of the Code of Criminal Procedure. It says that it extends to the whole of India, "but, in the absence of any specific provision to the contrary, nothing contained herein shall affect. . any special form of procedure prescribed by any other law for the time being in force." Now, the words, "in the absence of any specific provision to the contrary" can reasonably be construed as meaning "in the absence of any specific provision to the contrary in any other law for the time being in force". In other words, in the absence of any specific provision to the contrary in the Madras Children Act, 1920, nothing contained in the Code of Criminal Procedure shall affect any special form of procedure prescribed by the Madras Children Act of 1920 in rule 3 of the Madras Children Rules, 1940. There is no specific provision in the Madras Children Act to the effect that section 193 of the Code of Criminal Procedure would apply. On the other hand, rule 3 of the Madras Children Rules implies that section 193 of the Code of Criminal Procedure requiring an order of committal is meant to be dispensed with, though it would have been better if the idea had been explicitly express. Reading section 1 (2) of the Code of Criminal Procedure along with rule 3 of the Madras Children Rules, 1940, it seems to me that section 193 of the Code of Criminal Procedure will not affect the special form of procedure prescribed by rule 3 of the Madras Children Rules, 1940. It follows that there need not be an order of committal to the Court of Sessions and the Court of Session can straightaway take cognizance of a case triable by it, in so far as a juvenile is concerned. This answers the remarks of Kailasam, J., that an Assistant Sessions Judge tries cases on committal only.

32. The next observation of Kailasam, J. is :

"He may be a Court under the Children Act to hear an appeal, but the

> Court empowered to try is the Juvenile Court and when that Court has jurisdiction under the Act, how can the Assistant Sessions Judge be empowered to try the case as summons case?"

We are not sure that we have gathered the precise meaning of the learned Judge's remark, but, if the remark implies, in any way, that an Assistant Sessions Judge has only an appellate jurisdiction, with respect, it would not be correct, because, firstly, Assistant Sessions Judge is also a Court of Session and has got original jurisdiction under the Act (as pointed out by Kailasam, J., himself in an earlier decision of his in— Andy Ambalam-Appellant-C.A. No. 825 of 1963 (dated the 28th September, 1964) and secondly, in practice, an Assistant Sessions Judge does not hear appeals in criminal cases and it is only the Sessions Judge who hears appeals in criminal cases. Kailasam, J., also seems to ask, how can the Assistant Sessions Judge try the case as summons case? The answer to this is to be found in rule 3 of the Madras Children Rules, 1940, which requires him to try the case as a summons case.

33. The result of my discussion so far may be summed up thus. Where a juvenile alone is accused of an offence, the case against him will, as hitherto, be tried by the Juvenile Court established under section 36 (1) of the Act even if the offence is one punishable with death or imprisonment for life. But, where he is accused of having committed an offence punishable with death or imprisonment for life along with an adult accused, it is desirable to avoid a conflict of decisions by the Juvenile Court and the Court of Session. To achieve this purpose, the police officer will file the charge-sheet against the adult accused in the Court of the concerned Sub-Magistrate empowered under Chapter XVIII of the Code of Criminal Procedure to hold an enquiry, and the charge-sheet against the juvenile in the Court of Session. The Court of Session should hold up the trial of the juvenile till the enquiry by the Sub-Magistrate is over. If an order of committal is made in respect of the adult accused, the Court of Sessions will try the case against the adult accused separately from the case against the juvenile accused, one after the other. In respect of the juvenile accused, the summons case procedure should be adopted. Judgment should not be pronounced in either case till both the trials are over.

34. If the enquiry against the adult accused results in an order of discharge, the Court of Session may straightaway try the juvenile accused. But, if he wants, he may wait for a short time to see whether any revision petition is filed against the order of discharge.

35. We may add that, as a result of the observations in R. T. No. 92 of 1959 the Government in 1963 proposed some amendments abolishing the prohibition of joint trial of an adult and a juvenile in grave cases of murder, dacoity, etc., and modifying section 38-B (1) of the Madras Children Act to that effect. Vide their letter No. 150749 Pr. III/59-12 dated 30th January, 1961. The Honourable Judges of this Court on the administrative side agreed to the above suggestions (P.Dis.No.242 of 1961). Thereafter the Government suggested some draft amendments which again were accepted by the Honourable Judges of this Court on the administrative side. (P.Dis.No. 540 of 1965). But the matter seems to have been dropped there. If felt expedient, the matter may be reopened. But what we are now suggesting is within the frame work of the existing law, which (section 38-B) forbids a joint trial. Our suggestion is confined to major offences punishable with death or imprisonment for life. In respect of other offences, the Juvenile Court can continue to try them and any possible conflict of decisions may be ignored, because if we were to avoid a conflict of decisions for all offences, the Juvenile Court may not have much work, and we shall have to draw the line somewhere.

36. In accordance with the above views, in Cr. M. P. No. 3957 of 1972, we direct J.C. No. 264 of 1972, pending on the file of the Juvenile Court, Tirunelveli, to be transferred to the Court of Session. We make this direction in exercise of the powers conferred by section 526 (1) (e) of the Code of Criminal Procedure, because we consider it expedient for the ends of justice. The Sessions Judge should not pronounce judgment in that case or in S.C. No. 112 of 1972 till he is in a position to pronounce judgment in both the cases.

37. Similarly, in Cr. M. P. No. 996 of 1973, we direct J. C. No. 239 of 1972 pen-

ding on the file of the Juvenile Court, Tirunelveli, to be transferred to the Court of Session, to be tried by the Assistant Session Judge who tries S. C. No. 119 of 1972. The Assistant Sessions Judge should not pronounce judgment in either case till he is in a position to pronounce judgment in both the cases.

38. If there are similar cases, the Sessions Judge or the District Magistrate concerned should make a reference to this Court for transfer of the case from the Juvenile Court to the Court of Session.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail and K.S. Palaniswami, JJ.*

Gopal Naidu .. *Appellant**

v.

Special Tahsildar for Land Acquisition, Neighbourhood Project, Madurai and others.

Respondents.

and

Executive Officer, Kallalagar Devasthanam, Alagarkoil, Madurai District .. *Appellant*

v.

The Special Tahsildar for Land Acquisition, Neighbourhood Project, Madurai and others.

.. *Respondents.*

(A) *Inam grant—Paricharakam service in temple—Grant whether of both warams or of melwaram only—Entries in Inam Register—Value—Acquisition of land granted, under Land Acquisition Act—Compensation amount—Rival claims—Reference under section* 30—*Determination —Position and rights of Devasthanam.*

(B) *Land Tenures—Grant of land for personal service in temple—Alienation—Invalid.*

(C) *Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of* 1963) *—Despite vesting of land in Government, acquisition under Land Acquisition Act on basis of land as belonging to others—Latter Act applies in ascertaining interests of persons entitled to compensation.*

The grant being by way of personal service inam the land cannot be alienated. [*Para.* 10.]

Under the Minor Inams Abolition Act, 1963, persons satisfying certain conditions with regard to kudiwaram in an inam are entitled to ryotwari pattas. Where, however, in spite of the vesting of the land in Government under the Act, the Government had invoked the provisions of the Land Acquisition Act for acquiring the lands on the basis that the lands do not belong to the Government but belong to others, the provisions of the Land Acquisition Act should be applied to ascertain the interests of the persons entitled to the compensation and the Inams Abolition Act cannot apply. [*Para.* 11]

Cases referred to.—

Arunachalam Chetti v. *Venkatachalapathi Guruswamigal*, (1919) 37 M.L.J. 460 : 46 I.A. 204 : I.L.R. 43 Mad. 253 : 53 I.C. 288 ; A.I.R. 1919 P.C. 62 ; *Sankaranarayana Pillaiyan's case*, (1947) 2 M.L.J. 315 : 74 I.A. 230 : 60 L.W. 650 : A.I.R. 1948 P.C. 25 ; *Periaswami Gounder* v. *Sundaresa Iyer*, (1965) 1 An.W.R. (S.C.) 119 : (1965) 1 S.C.J. 688: (1964) 8 S.C.R. 347: A.I.R. 1965 S.C. 516 ; *Satyanarayana* v. *Venkatappayya*, 1953 S.C.J. 283 : 1953 S.C.R. 1001 : (1953) 1 M.L.J. 693 : A.I.R. 1953 S.C. 195 ; *Anjaneyalu* v. *Venugopal Rice Mills*, 42 M.L.J. 477 : I.L.R. 45 Mad. 620 : A.I.R. 1922 Mad. 197 ; *Ramakrishnamma* v. *Venkatasubbiah*, 68 M.L.J. 46 : I.L.R. 58 Mad. 389 : A.I.R. 1935 Mad. 252 ; *Masumayya* v. *Official Receiver, Kurnool*, (1942) 2 M.L.J. 504 ; I.L.R. (1943) Mad. 349 : A.I.R. 1943 Mad. 72; *Ramanathan Chettiar* v. *Kalidasa Kavandan*, (1936) 71 M.L.J. 398 : A.I.R. 1936 Mad. 559.

Appeals against the Decree of the Court of the Subordinate Judge (I Additional), Madurai, dated 24th January, 1967 and made in L.A. O.P. No. 564 of 1965.

K.S. Champakesa Iyengar and *K.C. Srinivasan*, for Appellant.

The Additional Government Pleader, *C. Natarajan, C.N. Sivakumar, K. Sarvabhauman, T.R. Mani, K. Thirumalai* and *S. Ramasubramaniam*, for Respondents.

The Judgment of the Court was delivered by

Palaniswami, J.—These two appeals arise out of an order of the Subordinate Judge of Madurai made in a reference under sec-

* A. Nos. 769 of 1967 and 15 of 1968.
17th November, 1972.

tion 30 of the Land Acquisition Act, 1894. An extent of 4 acres, 16 cents in R.S. No. 167/1, Tallakulam village, Madurai Taluk has been acquired under the Land Acquisition Act, 1894 for Madurai Neighbourhood Project. As there were rival claims for the compensation, the Acquisition Officer made the reference under section 30. The first claimant contended that the land had been granted in inam in favour of his ancestors in both warams for the service of *paricharakam* in the pagoda of Kallalagar Devasthanam and that he was entitled to the compensation amount in respect of 1 acre 63 cents. He conceded that the second claimant was entitled to compensation in respect of 2 acres 53 cents as alienee. The second claimant supported the case of the first claimant that what was granted consisted of both the Melwaram and Kudiwaram and claimed compensation for the extent of 2 acres 53 cents, which he claimed to have purchased on 1st March, 1960, from the heir of the original grantee. The Kallalagar Devasthanam contended that what was granted was for the performance of *paricharakam* service, that the inam was inalienable and that, therefore, the entire compensation amount was payable to the Devasthanam.

2. Claimants 3 to 15, 18 to 23 and 25 contended that what was granted was only melwaram, that kudiwaram was always in the possession and enjoyment of the ryots and that under the provisions of the Minor Inams Abolition Act, 1963 (Madras Act XXX of 1963) the kudiwaramdars alone were entitled to receive the compensation amount. Claimants 16 and 17 did not put forward any claim.

3. On a consideration of the evidence, the Court below held that the grant for *paricharakam* service comprised only melwaram interest that the grant was not to the office of *paricharakam* and that the grant being personal, the Devasthanam was not entitled to claim the compensation. The Court below further found that the *kudiwaram* interest was dealt with by those in possession, and accepting their claim, the Court below held that claimants 3 to 15, 18 to 23 and 25 were entitled to share the compensation in certain proportions. Aggrieved by this order the second claimant has filed A.S. No. 769 of 1967, whereas the Executive Officer of the Kallalagar Devasthanam has filed A.S. No. 15 of 1968.

4. The first claimant, Amudar Sundararaja Iyengar, the descendant of the original grantee, put forward the contention that the grant was of both warams. Though his contention was not accepted by the Court below, he has not preferred an appeal. He was supported by the second claimant Gopal Naidu, who has filed A.S. No. 769 of 1967. It was the contention of the Devasthanam also that the subject-matter of the grant was of both warams. In these circumstances, the substantial question that arises for consideration is whether the subject-matter of the grant was of both warams or was of melwaram only. There is no presumption that the grant was of both warams or of melwaram only. The question as to whether, in a particular case, the subject of grant was of both warams or one waram only has to be decided upon the evidence in each case. The original title deed is not produced. The only material evidence is that furnished by the extract from the Inam Register, which is marked as Exhibit B-6. The importance of the recitals in the Inam Register has been emphasised by the Judicial Committee in *Arunachalam Chetti* v. *Venkatachalapathi Guruswamigal*[1]. It is pointed out that the Inam Commission enquiry is one made on the spot after hearing witnesses and examining documents with regard to each property and that where no other evidence is available, utmost importance should be attached to the information set forth in the Inam Register. The Privy Council reiterated this view in *Sankaranarayana Pillaiyan's case*[2]. Following this view, the Supreme Court in *Periaswami Gounder* v. *Sundaresa Iyer*[3], held:

> "As observed by the Judicial Committee the entries made in the said Register are the result of an elaborate enquiry based upon oral evidence and on the spot enquiry and scrutiny of available accounts and records."

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1. (1919) 37 M.L.J. 460 : 46 I.A. 204 : I.L.R. 43 Mad. 253 : 53 I.C. 288 : A.I.R. 1919 P.C. 62.
2. (1947) 2 M.L.J. 315 : 74 I.A. 230 : 60 L.W. 650 : A.I.R. 1948 P.C. 25.
3. (1965) 1 An.W.R. (S.C.) 119 : (1965) 1 M.L.J. (S.C.) 119 : (1965) 1 S.C.J. 688 : (1964) 8 S.C.R. 347 : A.I.R. 1965 S.C. 516.

5. The extract from the Inam Register, Exhibit B-6, consists of several headings, each one of which is divided into several sub-heads. The first major heading reads "Class, extent and value of inam". This is divided into several sub-heads. The first major heading reads: "Class, extent and value of inam". This is divided into seven sub-headings. In column (2), the heading is: "General class to which the inam belongs". Under this column, the entry is:

"*Devadayam*". Column (3) requires the survey number and the name of the field comprised in the grant to be given. Under this column, the entry is: "Wet. Kallasayi. One crop". Columns (4) and (5) require the information as regards the local measure and acres and decimals to be given. Necessary details are given as regards the extent. The heading in column "Revised or present assessment". No entry is found in column (6), whereas in column (7) the amount is mentioned as "Rs. 24-11-1".

6. The next major head reads "Description, tenure and documents in support of the inam". This is sub-divided into five columns. Column (8) is important, the heading of which is: "Description of inam. If for service it is to be stated whether the service is continued. If for tanks, buildings, etc., whether they are efficiently kept up." Under this column, the entry reads: "For the service of *paricharakam* in the pagoda of Kallalagar, Melur Taluk, Venkatachalapathi at Tallakulam. Now rendered". The common heading for columns (9) and (10) is "Tenure". In column (9) the heading is: "Whether free of tax *i.e.*, Sarvadumbala etc., or liable to quit rent *i.e.*, jodi, katubadi, bediga etc. Amount of latter to be entered." The entry under this column (10) is: "Hereditary unconditional for life only or for two or more lives". The entry under this column is "Permanent". The heading in column (11) is: "By whom granted and in what year". No information is given under this column. The heading in column (12) is: "Written instruments in support of the claim". The entry in this column is: "Chitta of F. 1212 and 1217. Extent as per F. 1212. K.V. 64 3-14-0. No excess." Evidently, the figures "3-14-0" denote the extent in local measure as given in column (4).

7. The next major heading is: "Name and relationship of original grantee and of subsequent present holders—Length of possession". This again is divided into eight columns. In column (13) the heading is "Name of original grantee". No entry is found under this column. In column (14) the heading is: "Name entered in the register prepared according to Regulation XXXI of 1802 or in the permanent settlement accounts and relationship of persons so entered to original grantee". The heading in column (15) is "Name entered in the survey or in any accounts and relationship to predecessors." The common entry found in both these columns is: "In F. 1212 and 1217. Amudar Ramaswami Aiyangar." Columns (16) and (17) require the particulars to be given as regards the name, age and place of residence etc. of the present owner. The common entry found in both these columns is:"Madhura—Ramaswami Ayyangar 20". In column (18) the heading is "Relationship to original grantee or subsequent registered holders". The entry under this column is: "Grandson". It is unnecessary to refer to columns(19) and (20) which are not important. In column (21), the heading is "Remarks" under which an abstract of the Government Order along with the Deputy Collector's opinion and recommendation is required to be given. Under this column the entry is "To be confirmed under rule 3 clause 2, jodi Rs. 4-15-1. Sd. A. Srinivasa Rao, Deputy Collector and Inam Commissioner. 21st May, 1863". Column (22) deals with the decision of the Inam Commissioner or his assistant. Under this column, the entry is: "Confirmed. Sd. P. Chentsal Rao, Ag. Spl. Assistant. 1st October, 1863. T.D. No. 1313."

8. In this case, we do not have the benefit of any statement recorded by the Inam Commissioner. Nor do we have the benefit of the title deed issued by the Inam Commissioner. But the second claimant has produced certain pattas which fortify the inference that the grant was of both warams. Exhibit A-18 is a patta issued in the year 1806 by the Collector of Madurai in favour of Ramaswamy Ayyangar, the predecessor in interest of the first claimant,describing the

said Ramaswami Ayyangar as : "கிராமத்து குடியானவனுக்கிய". Exhibit A-19 is another patta issued in the name of the first claimant in the year 1918 in respect of miscellaneous revenue. It contains *nota bene*. It *inter alia* says that in case minerals are found in the land, excess kist would be levied. That recital shows that the patta was issued in favour of the person in possession of the land. Exhibit A-20 is another similar patta issued in the year 1903 containing a similar reference. The recitals in the pattas are also consistent with the view that the grant was of both warams. The entries in the Inam Register themselves clearly indicate that the subject matter of the grant was the land and not merely the assessment. The mere fact that in one of the columns assessment of the land is mentioned would not lead to the inference that the inam grant comprised only of melwaram right. That was the principle laid down by the Supreme Court in *Satyanarayana* v. *Venkatappayya*[1]. Construing a similar extract, the Supreme Court in *Periaswami Gounder* v. *Sundaresa Iyer*[2], held that the grant was of both warams. It is pointed out in that decision that details regarding the nature of the land whether dry or wet are only consistent with the view that the grant was of both warams rather than being of mere melwaram. The further fact to be noted is that if at the time of the Inam Commission enquiry anybody other than the descendant of the original grantee was in possession as Kudiwaramdar, it is not likely that such information would have been omitted to be recorded in the Inam Register. The claimants whose claim has been upheld by the Court below have not produced any evidence to support their contention that at the time of the grant the Kudiwaram belonged to their ancestors. No document anterior to the Inam Commission enquiry, namely, 1863, has been produced by these claimants to support their case that kudiwaram interest was dealt with by their ancestors. Having regard to all these circumstances, we are of the opinion that the subject matter of the grant was of both melwaram and kudiwaram. We also hold that the grant was personal for performing the service and it was not in favour of the Devasthanam.

9. The claimants whose claim has been upheld by the Court below have not based their claim on the ground that they and their ancestors had acquired title by adverse possession for over the statutory period. The Counsel appearing for these claimants before us conceded this. The Court below has also referred to certain admissions contained in certain documents executed by the inamdar describing himself as melwaramdar and describing the persons in possession as kudiwaramdars. The Court below has placed considerable reliance upon this admission as fortifying its view that what was granted originally was of melwaram only and that the persons in possession were entitled to kudiwaram. We have already pointed out that from Exhibit B-6 it is clear that at the time of the Inam Commission enquiry nobody other than the descendant of the grantee was in possession. The mere fact that the inamdar, under the erroneous impression, called himself as melwaramdar and called the tenants in possession as kudiwaramdars would not confer title upon the persons in possession. It is conceded by the Counsel appearing for the claimants whose claim has been upheld by the Court below that such admission by itself would not confer title on the persons in possession. The Counsel did not dispute the position that if, on a construction of Exhibit B-6 the inference should follow that the subject-matter of the grant was of both warams, no amount of admission by the inamdar would destroy that inference and also would not confer title upon persons in possession with kudiwaram right.

10. The second claimant, appellant in A.S. No. 769 of 1967, is the alienee of both melwaram and kudiwaram regarding a portion of the acquired property. It is on that basis that he claims a portion of the acquired property. It is on that basis that he claims a portion of the compensation. The inam was personal and was inalienable as it was granted for the performance of *paricharakam* service. The Court below failed to consider the contention urged on behalf of the Devasthanam that the grant being personal for the performance of *paricharakam* service in the temple, it was inalienable and that the

1. 1953 S.C.J. 283 : 1953 S.C.R. 1001 : (1953) 1 M.L.J. 693 : A.I.R. 1953 S.C. 195.
2. (1965) 1 S.C.J. 688 : A.I.R. 1965 S.C. 516.

alienee does not get any title. That a personal service inam is inalienable is well settled. In *Anjaneyalu* v. *Venugopal Rice Mills*[1], it was held that a personal inam for public service is not a property that is liable to attachment under section 60, Civil Procedure Code. It is pointed out that where the land is personal inam for public service, section 6 (*h*) of the Transfer of Property Act prohibits transfer of such property as it is opposed to public policy and the transfer cannot convey any title. In *Ramakrishnamma* v. *Venkatasubbiah*[2], it was held that the land burdened with the performance of a service of a public nature is inalienable being opposed to public policy and that Dashabandham inams being burdened with a service of a public nature are inalienable and cannot be sold in execution of a decree against the inamdar. In *Masumayya* v. *Official Receiver, Kurnool*[3], the question arose whether, on the adjudication of a holder of certain inam as an insolvent, the inam land would vest in the Official Receiver. The question was answered in the negative, holding that such land not only could not be alienated but could not be transferred from the holder to the Official Receiver. In *Ramanathan Chettiar* v. *Kalidasa Kavandan*[4] it was held that the mortgage of a temple service inam is opposed to public policy and is, therefore, invalid. The Counsel appearing for the second claimant did not bring to our notice any authority to hold that the alienation under which this claimant claims title is valid. We, therefore, hold that the second claimant, who claims to have acquired title as an alienee from the descendant of the original grantee, has no valid title to the acquired property and is, therefore, not entitled to claim a share in the compensation.

11. It was contended on behalf of those in possession that they would be entitled to ryotwari pattas under the provisions of the Minor Inams Abolition Act, 1963, and that if such a patta is obtained, the holder of the patta would be entitled to the entire compensation. We do not accept this contention. No doubt, under the Minor Inams Abolition Act, persons satisfying certain conditions with regard to kudiwaram in an inam are entitled to ryotwari patta. Under that Act, minor inams are abolished and all the lands in such inams have vested in the Government. But in these cases, notwithstanding such vesting, the Government have invoked the provisions of the Land Acquisition Act on the basis that the lands do not belong to the Government but belong to others. Therefore, the provisions of that Act should be applied in ascertaining the interests of the persons entitled to the compensation. We may also point out in this connection that the question of obtaining patta in recognition of kudiwaram right does not arise in view of our finding that the grant was of both warams.

12. In the result A.S. No. 769 of 1967 is dismissed. There will be no order as to costs. So far as the Devasthanam is concerned, though it is not entitled to the compensation amount, it is entitled to have suitable orders being passed for securing the amount so that the service may be continued. The Court below will pass suitable orders under section 32 (1) of the Land Acquisition Act for investing the amount. The Devasthanam is at liberty to move the Court below for this purpose. A.S. No. 15 of 1968 is ordered accordingly. No order as to costs.

P.S.P. ——— *Appeal dismissed.*

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1. 42 M.L.J. 477 : I.L.R. 45 Mad. 620 : A.I.R. 1922 Mad. 197.
2. 68 M.L.J. 46 : I.L.R. 58 Mad. 389 : A.I.R. 1935 Mad. 252.
3. (1942) 2 M.L.J. 504 : I.L.R. 1943 Mad. 349 : A.I.R. 1943 Mad. 72.
4. (1936) 71 M.L.J. 398 : A.I.R. 1936 Mad. 559.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M. M. Ismail and K. S. Palaniswami, JJ.*

M. E. Muthirula Mudaliar .. *Appellant**

v.

M. E. Nataraja Mudaliar and others .. *Respondents.*

and

Executive Officer, Kallalagar Devasthanam, Madurai .. *Appellant*

v.

The Special Tahsildar for Land Acquisition, Neighbourhood Project Madurai and others .. *Respondemts*

(A) *Inam grant—Whether of both warams or of melwaram only—Extract from Inam Register, Statement recorded by Inam Commissioner, Recitals in Inam Title deed—Probative value—Mention in Inam Register of certain amount as assessment—Significance.*

(B) *Land Tenures—Personal service inam for performance of service in temple—Rights of Devasthanam on acquisition of land under the Land Acquisition Act—Compensation amount—Proper order to be passed indicated—Alienation by holder invalid.*

(C) *Land Acquisition Act (I of 1894)—Acquisition of land on basis that the land is not vested in Government but belongs to others—Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963)—No scope for invoking—Persons entitled to compensation to be ascertained according to Land Acquisition Act only.*

In deciding whether, an inam grant was of both warams or of melwaram only, the title deed issued by the Inam Commissioner, the statement recorded by the Inam Commissioner and extract of entries from the Inam Register are important evidence and are of great value. [*Para.* 5.]

Where the grant is of both warams the mere fact that a certain amount is mentioned as assessment in a column of the Inams Register does not mean that the grant is of melwaram only. [*Para.* 9.]

On the evidence, held,

The grant was of both warams by way of personal service inam. [*Para.* 9.]

A personal service inam is inalienable. The holder for the time being is incompetent to alienate the inam land and the alienation is invalid. [*Para.* 10.]

Where, in spite of the abolition of minor inams and the vesting of the lands in the Government, Government invoked the provisions of the Land Acquisition Act for acquiring the land on the basis that it does not belong to the Government but belongs to others, there is no scope for the application of the Minor Inams Abolition Act, 1963 and the provisions of the Land Acquisition Act will apply to ascertain the interests of the persons entitled to compensation on acquisition. [*Para.* 11.]

Inasmuch as, in the instant case, though the grant had been made for performance of service in the temple it was a personal grant and not one in favour of the Devasthanam, on the acquisition of the land under the Land Acquisition Act, the Devasthanam cannot claim the compensation amount, but it was entitled to see that the amount was invested in such a way that adequate return is obtained for payment to the person doing the service so long as the service is continued to be performed. [*Para.* 12.]

Cases referred to :—

Arunachalam Chetty v. *Venkatachalapathi Guruswamigal*, (1919) 37 M.L.J. 460 : A.I.R. 1919 P.C. 62: I.L.R. 43 Mad. 253: 46 I.A. 204; *Sankaranarayana Pillaiyan's case*, (1947) 2 M.L.J. 315 : 74 I.A. 230: A.I.R. 1948 P.C. 25 : 60 L.W. 650; *Periaswami Gounder* v. *Sundaresa Ayyar*, (1965) 1 S.C.J. 688: (1964) 8 S.C.R. 347: A.I.R. 1965 S.C. 516; *Satyanarayana* v. *Venkatappayya*, 1953 S.C.J. 283 : (1953) S.C.R. 1001 : (1953) 1 M.L.J. 693: A.I.R. 1953 S.C. 195; *Anjeneyalu* v. *Venugopal Rice Mills*, 42 M.L.J. 477: I.L.R. 45 Mad. 620; *Ramakrishna Amma* v. *Venkatasubbiah*, 68 M.L.J. 46 : I.L.R. 58 Mad. 389 : 40 L.W. 918 : A.I.R. 1935 Mad. 252 ; *Hanumayya* v. *Official Receiver*,

* Appl. Nos. 589 and 848 of 1967 and 8 of 1968.
17th November, 1972.

Kurnool, (1942) 2 M.L.J. 504, A.I.R. 1943 Mad. 72 : I.L.R. (1943) Mad. 349 : (1942) 2 M.L.J. 504; *Ramanathan Chettiar* v. *Kalidasa Kavandan*, (1936) 71 M.L.J. 398 : A.I.R. 1936 Mad. 559.

Appeals against the decree of the Court of the First Additional Subordinate Judge, Madurai, dated 17th January, 1967 and passed in L.A.C.O.P. No. 411 of 1965.

K. Parasaran, S. Raja Ram and *V. S. Subramanian*, for Appellant.

The Additional Government Pleader, for 1st Respondent.

R. Muthukumaraswami, Manicka K. Ramalingam, for Respondents.

The Judgment of the Court was delivered by

Palaniswami, J.—These three appeals arise out of an order of the Subordinate Judge of Madurai made in a reference under section 30 of the Land Acquisition Act, 1894. For the purpose of Madurai Neighbourhood Project, R.S. No. 161/2 measuring 2 acres 98 cents in the Village of T llakulam in Madurai Taluk was acquired. Rival claims were put forward as regards the compensation. Therefore, the Acquisition Officer referred the matter under section 30. Claimants 1 to 3 and 5 to 8 contended that the land was granted in inam of both warams to the ancestor of one Periyathambi Velar for the purpose of rendering service of supply of new pots to Kallalagar Devasthanam Temples, that Periyathambi Velar sold away one-half of the property to the first claimant and the other half to the second claimant and that by reason of these purchases, claimants 1 and 2 were entitled to the entire compensation in equal halves. The fourth claimant Audimathiriyar claimed compensation in respect of 75 cents alleging that he and his ancestors were in possession thereof from time immemorial. His contention was that what was granted originally was melwaram only in favour of the ancestor of Periyathambi Velar. Kallalagar Devasthanam, the ninth claimant, contended that the inam was granted to the holder of potter service in his capacity as holder of that service in the temples and that the descendants of the grantee had no right of alienation and that the alienations were void and did not confer any title upon the alienees. The Devasthanam contended that the entire compensation should be paid to it for the purpose of regranting the property under the provisions of the Minor Inams Abolition Act, 1963 (Madras Act XXX of 1963).

2. The Court below held that the original grant was of melwaram only and the grant was not to an office pertaining to any temple. The Court below upheld the alienations under which claimants 1 and 2 claimed title and found that claimants 1 to 8 were entitled to Kudiwaram interest in certain proportions and that claimants 1 and 2 were entitled to melwaram interest and that compensation was divisible accordingly. Aggrieved by this order, the first claimant has filed A.S. No. 589 of 1967, whereas the second claimant has filed A.S. No. 848 of 1967, their contention being that they are exclusively entitled to the entire compensation in equal shares. The Executive Officer of Kallalagar Devasthanam has filed A.S. No. 8 of 1968, contending that the grant was of both warams, that the inam was inalienable and that the entire compensation should be secured for the continuance of the service.

3. Neither side let in oral evidence. The parties were content to take a decision only on the basis of the documents produced by them. It was the common contention of claimants 1 to 3 and 5 to 8 that what was granted in inam consisted of both melwaram and kudiwaram in connection with the service of supply of pots to Kallalagar Devasthanam Temples. The only claimant, who put forward the contention that the subject-matter of the grant consisted of only melwaram, was the fourth claimant. He vaguely alleged that from time immemorial an extent of 75 cents, out of the acquired property, was in the possession of his family. He did not specifically plead that his family had acquired title to the said extent by adverse possession. It was not his case that both warams had been granted in inam to the service holder and that in denial of the right of the said service holder his family enjoyed 75 cents and acquired title by adverse possession. To

questions put by us, the Counsel appearing for several claimants, except the Counsel for the Devasthanam, frankly conceded before us that the claim to share the compensation is not based upon adverse possession, nor on the ground that kudiwaram had been granted in favour of their ancestors. Their only contention was that their ancestors were already in possession of the land as ryots that what was granted consisted of the melwaram only. The Counsel for claimants 1 and 2 contended that as alienees from the service holder, these claimants were entitled to the entire compensation. In these circumstances, the only question that arises for consideration, on the submission made before us, is whether the grant consisted of both warams or only of melwaram.

4. The said question had been answered by the Court below holding that the subjectmatter of the grant was only the melwaram on the basis of certain dealings with the kudiwaram right by those in possession as if they were entitled to that right. The Court below totally failed to consider the important documents that have a bearing upon the question as to the subject-matter of the grant, namely, whether the grant consisted of both warams or only melwaram. Those documents are, Exhibit B-1, which is the title deed issued by the Inam Commissioner, Exhibit B-2 which is the certified copy of the statement given by Muthukaruppa Velar and Exhibit B-3, which is an extract from the Inam Register. The title deed Exhibit B-1 was issued in 1863. The earliest document produced on the side of the claimants who claim kudiwaram right is of the year 1886 only, Exhibit A-25. The Court below committed a serious error in observing that even prior to the date of the issue of Exhibit B-1, the kudiwaram interest had been dealt with by ryots. This clear error totally vitiated his conclusion.

5. No doubt, the original title deed is not produced. But we have, as already pointed out, the title deed issued by the Inam Commissioner and the statement recorded by the Commissioner and also an extract from the Inam Register. The importance of the recitals in the Inam Register has been emphasised by the Judicial Committee in *Arunachalam Chetty* v. *Venkatachalapathi Guruswamigal*[1], It is pointed out that the Inam Commission enquiry is one made on the spot after hearing witnesses and examining documents with regard to each property. It is also pointed out that where no other evidence is available, utmost importance should be attached to the information set forth in the Inam Register. This view was reiterated by the Privy Council in *Sankaranarayana Pillaiyan's case*[2]. The view of the Judicial Committee has been accepted and followed by the Supreme Court in *Periyaswami Gounder* v. *Sundaresa Ayyar*[3], in which it is pointed out:

> "As observed by the Judicial Committee the entries made in the said register are the result of an elaborate enquiry based upon oral evidence and on the spot enquiry and scrutiny of available accounts and records".

6. In the above background, the various entries in the Inam Register extract, which is marked as Exhibit B-3, may be examined. The first major heading is: "Class, extent and value of inam" and this is divided into seven sub-headings. In column (2) the heading is: "General class to which the inam belongs". Under this column the entry is "Devadayam". Under column (3) particulars regarding survey number and name of field or fields comprised in the grant etc. are required to be given. Under this column the entry is: "Wet. One crop. Kosavansayi". Survey numbers are also given. Columns (4) and (5) deal with local measure in terms of acre etc. The extents are given under these columns. Column (6) requires survey assessment to be given, whereas column (7) requires revised or present assessment to be given. Under column (6) no entry is made. Under column (7) details are given showing that the assessment is 12-14-2. The next major heading reads "Description, tenure and documents in support of the inam". This is divided into five columns. Column (8) is import-

1. (1919) 37 M.L.J. 460 : A.I.R. 1919 P.C. 62 : I.L.R. 43 Mad. 253 : 46 I.A. 204.
2. 74 I.A. 230 : A.I.R. 1948 P.C. 25 : 60 L.W. 650 : (1947) 2 M.L.J. 315.
3. (1965) 1 S.C.J. 688 : (1964) 8 S.C.R. 347 = A.I.R. 1965 S.C. 516.

ant, and the heading is "Description of inam. If for service, it is to be stated whether the service is continued. If for tanks, buildings, etc. whether they are efficiently kept up." The information given under this column reads as follows: "For the service of supplying pots to the pagoda of Kallalagar in the Melur Taluk. Now rendered". In column (9), the heading is: "Whether free of tax, *i.e.*, Sarvadumbala, *etc.*, or liable to quit rent, *i.e.*, jodi, kattubadi, bodiga etc. Amount of latter to be entered". Under this column, the entry is "Tax free". In column (10), the heading is: "Hereditary unconditional, for life only or for two or more lives". The entry is "permanent". No entry is found in column (11), the heading of which is "By whom granted and in what year". Column (12) requires information to be given about the written instruments in support of the claim. Under this column the information given is: "Chitra of F. 1212 and 1217. Extent as per F. 1212 K. V. 64th. 2-4-64th. No excess". The next major head is: "Name and relationship of original grantee and of subsequent and present holders—length of possession". This again is divided into eight columns. Under column (13) what is required to be given is about the name of the original grantee. No entry is found therein. Under column (14), the heading is: "Name entered in the register prepared according to Regulation XXXI of 1802, or in the permanent settlement accounts, and relationship of persons so entered to original grantee". Under this column, the entry is : "In F.1212 and 1217. Muthukaruppan". In column (15) the heading is: "Name entered in the survey or in any subsequent accounts, and relationship to predecessors. No entry is found under this column. Column (16) requires the name and age of the present owner to be given. Column (17) requires the place of residence of the present owner. Under these two headings the entry is "Maditc hiyam. Karuppayi. 30". In column (18), which requires the relationship to the original grantee, the entry is "Grandson's widow". It is unnecessary to refer to the columns (19) and (20) which are not important. Under the remarks column dealing with the Deputy Collector's opinion and recommendation, the entry is "To be confirmed under rule 3, Clause 2". The last column deals with the decision of the Inam Commissioner. Under this column the entry is "Confirmed". The point to be noted with regard to the several entries is that nowhere it is mentioned that the land was in the possession of anybody else. If the grant was of mere melwaram only, there was no need to mention details about the lands. The details are more consistent with the grant being of both the warams than being of mere melwaram. If at the time of the Inam Commission enquiry anybody else was in possession, it is not likely that such a fact would have been failed to be noticed.

7. Exhibit B-2, is a certified copy of the statement given by one Muthukaruppa Velar, said to be the brother of Karuppayee mentioned in the Inam Register at the time of Inam Commission enquiry. In column (2) of this statement the heading is "The name of the inamdar as entered and the name of the enjoyer". Under this column, the entry is "Muthukaruppa Velan. Enjoyment Muthukaruppa Velan". In column (7) the heading is "Details about the inam and terms thereof". Under this column it is stated that the land was granted in inam for the purpose of supplying pots to Prasanna Venkatachalapathi Temple and Alagar Temple to Muthukaruppa Velan and that the land was being enjoyed by his daughter-in-law, Karuppayee. It is also stated that Muthukaruppa Velan, who gave the statement, was maintaining the said Karuppayee and was also her brother. It is also stated that Muthukaruppa Velan was keeping the land in his possession and enjoying the same and maintaining Karuppayee and performing the service of supplying pots to the temples. The foregoing entries are consistent with the entries found in the Inam Register.

8. Next we come to the title deed Exhibit B-1, which was issued by the Inam Commissioner. It reads as follows:

"No 1316.

Title Deed Granted to Karuppayi—

1. On behalf of the Governor in Council of Madras, I acknowledge

your title to a devadayam or pagoda service inam situated in the village of Tellakolam in the Taluk of Madura in the District of Madura claimed to be of acres....of dry land, and acres (Two) 2.97 of wet land and held for the support of service of supplying pots to the pagoda of Kallalagar in that village in the Melur Taluq.

(2) This Inam is confirmed to you and your successors tax free; to be held without interference so long as the conditions of the grant are duly fulfilled.

(Sd.) ———

Dated Coimbatore, *Inam Commissioner.*"
2nd October, 1863.

9. Taking the three documents Exhibits B-1 to B-9 together, our conclusion is that what was granted consisted of both melwaram and kudiwaram, that is the land itself. Considering a similar extract from the Inam Register the Supreme Court in *Periaswami Gounder* v. *Sundaresa Ayyar*[1], held that the grant consisted of both the warams. The mere fact that certain amount is mentioned as assessment in the Inam Register does not necessarily mean that the grant was of melwaram only. The Supreme Court had to consider the effect of such an entry in *Satyanarayana* v. *Venkatapayya*[2], It is pointed out that where the question is whether the inam comprised the land itself or only of the melwaram interest in the properties, it cannot be inferred that the inam grant comprised only of melwaram from the fact that under column 7 in the Inam Register only the amount of assessment is set out. The Court below, as already pointed out came to the conclusion that the grant was only of melwaram, placing reliance upon the assertions made by the persons in possession in certain documents executed by them. We have already pointed out that the claim is not put forward on the basis that the persons in possession had acquired title by adverse possession. The Court below has referred to certain documents like receipts issued by Periathambi Velar as if what was paid was melwaram describing the person who paid the amount as kudiwaramdar. Such admission has also been taken into consideration in coming to the conclusion that the grant was only of melwaram. The Counsel appearing for the claimants in possession frankly conceded that such admission would not confer right of kudiwaram on the persons in possession, if we hold on a construction of the recitals in Exhibits B-1 to B-3 that the grant was of both warams. In these circumstances, we do not consider it necessary to refer to such documents containing the so-called admissions in detail. It is not the case of those who claim kudiwaram right that the service-holder conveyed the kudiwaram right alone in favour of their ancestors. It is likely that the lands were leased out by the service-holder and were allowed to be in the possession of the same family from generation to generation. But such continuous enjoyment by itself would not entitle those in possession to claim kudiwaram right. While collecting the rent, the inamdar mistakenly described himself as melwaramdar and described the person who paid the rent as kudiwaramdar. Such a description does not create title in favou of the persons in possession.

10. Claimants 1 and 2, who conceded that the subject of grant was both melwaram and kudiwaram, claimed the entire compensation for both melwaram and kudiwaram as alienees from the service-holder. Claimants 1 and 2 claimed to have purchased each a half share from Periathambi Velar in the year 1951 not only the melwaram right but also the kudiwaram right. It is on this basis that they claimed the entire compensation. The Devasthanam contended before the Court below that the alienations on which claimants 1 and 2 based their title were void and did not convey any title, as the grantee had no right of alienation. The Court below failed to advert to this aspect. It is rightly contended on behalf of the Devasthanam before us that the inam being a service inam, the holder for the time being is incompetent to alienate it. That a personal service inam is inalienable is well settled. In *Anjaneyalu* v. *Venugopal Rice Mills*[1], it was held that a personal inam for pub-

1. (1965) 1 S.C.J. 688 : A.I.R. 1965 S.C. 516.
2. 1953 S.C.J. 283 : (1953) S.C.R. 1001 : (1953) 1 M.L.J. 693 : A.I.R. 1953 S.C. 195.

1. 42 M.L.J. 477 : I.L.R. 45 Mad. 620 : A.I.R. 1922 Mad. 197.

lic service is not a property that is liable to attachment under section 60, Civil Procedure Code. It is pointed out that where the land is personal inam for public service, section 6 (*h*) of the Transfer of Property Act prohibits transfer of such property as it is opposed to public policy and the transfer cannot convey any title. In *Ramakrishna Amma* v. *Venkata Subbiah*[1], it was held that the land burdened with the performance or a service of a public nature is inalienable being opposed to public policy and that Deshabandham inams being burdened with a service of a public nature are inalienable and cannot be sold in execution of a decree against the inamdar. In *Hanumayya* v. *Official Receiver, Kurnool*[2] the question arose whether, on the adjudication of a holder of certain inam as an insolvent, the inam land would vest in the Official Receiver. The question was answered in the negative holding that such land not only could not be alienated but could not be transferred from the holder to the Official Receiver. In *Ramanathan Chettiar* v. *Kalidasa Kavandan*[3], it was held that the mortgage of a temple service inam is opposed to public policy and is, therefore, invalid. The Counsel appearing for claimants 1 and 2, namely, appellants in A. S. Nos. 529 and 848 of 1967, did not bring to our notice any authority to hold that the alienations under which those appellants claim title are valid.

11. It was contended on behalf of those in possession that they would be entitled to ryotwari pattas under the provisions of the Minor Inams Abolition Act, 1963, and that if such a patta is obtained, the holder of the patta would be entitled to the entire compensation. We do not accept this contention. No doubt, under the Minor Inams Abolition Act, persons satisfying certain conditions with regard to kudiwaram in an inam are entitled to ryotwari patta. Under that Act. minor inams are abolished and all the lands in such inams have vested in the Government. But in this case, notwithstanding such vesting, the Government have invoked the provisions of the Land Acquisition Act on the basis that the lands do not belong to the Government but belong to others. Therefore, the provisions of that Act should be applied in ascertaining the interests of the persons entitled to the compensation. We may also point out that the question of obtaining patta in recognition of kudiwaram right does not arise in view of our finding that the inam was of both warams.

12. Though the inam was granted for the performance of the service in the temples, that grant was not in favour of the Devasthanam. It was a personal grant for the performance of service in the temples and was not in favour of the Devasthanam. But the Devasthanam is entitled to see that the compenstion amount is invested in such a way that adequate return is obtained for payment to the person doing the service so long as the service is continued to be performed. To that limited extent, the Devasthanam is succeed, even though it is not entitled to claim the compensation for itself.

13. In the result, A. S. Nos. 589 and 848 of 1967 are dismissed. A. S. No. 8 of 1968 is allowed holding that the entire compensation amount should be invested by the Court below under section 32 (1) of the Land Acquisition Act, 1894. The Executive Officer of the Devasthanam is given liberty to move the Court below to invest the amount in a suitable way. The parties will bear their respective costs in all the appeals.

P. S. P. ——— *A. S. Nos.* 589 *and* 848 *of* 1967 *dismissed* ; *A. S. No.* 8 *of* 1968 *allowed.*

1. 68 M.L.J. 46 : I.L.R. 58 Mad. 389 : 40 L.W. 918 : A.I.R. 1935 Mad. 252.
2. I.L.R. (1943) Mad. 349 : (1942) 2 M.L.J. 504: A.I.R. 1943 Mad. 72.
3. (1936) 71 M.L.J. 398 : A.I.R. 1936 Mad. 559.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam and N.S. Ramaswami, JJ.*

A. P. Dorairaj .. *Appellant**

v.

The State of Madras by the Commissioner of Police, Madras .. *Respondent.*

(A) *Torts—Damages—Motor accident—Injury causing permanent disability—Left leg shortened by $1\frac{1}{2}$ inches—Impact on employment and prospects of promotion—Claimant Junior Engineer*-cum-*Salesman in a company—Gratuitous payments by employer—Not relevant in assessment of damages.*

(B) *Motor Vehicles Act (IV of* 1939), *section* 110-*A*.

In cases where the person injured in a motor accident receives from his employer payments or other benefits not as of right but gratuitously which might equal his wages, such payments or benefits are not to be considered in assessing the liability of the wrongdoer to recompense the injured regarding loss of wages. Even if there was no moral obligation on the part of the injured to refund the amounts to the persons who paid him the wrongdoer cannot be heard to say that there was no loss of wages and therefore he would not recompense the injured. [*Paras*. 11, 14 *and* 16.]

Where the claimant as a Junior Engineer-*cum*-Salesman was expected to move round, meet people and push the goods of his employer and by reason of the injury resulting from the motor accident he could no longer ride a Scooter and go out freely, naturally, his promotional prospects would be affected.

Even in the absence of evidence to show that, but for the accident, the claimant would have been promoted to a higher post, it is not unreasonable in the circumstances of the instant case, to hold that the claimant has, as a matter of fact, lost promotional chances to a certain extent and that he has lost about Rs. 50 per month on that account for the rest of his service. [*Para*. 18.]

Cases referred to :—

Liffen v. *Watson*, (1940) 1 K.B. 556; *Dennis* v. *London Passenger Transport Board*, (1948) 1 All E.R. 779; *Payne* v. *Railway Executive*, (1952) 1 K.B. 26: (1951) 2 All E.R. 910; *Judd* v. *Hammersmith etc., Hospitals*, 1960 1 All E.R. 607; *Perry* v. *Cleaver*, (1969) A.C.J. 363; *Browning* v. *War Office*, (1962) 3 All E.R. 1089; *Samaraj Oil Mills and Fertilisers and others* v. *D. Kothandaraman*, 1970 A.C.J. 405; *Gwalior and Northern India Transport Co. Ltd.*, v. *Dinkar Joshi*, A.I.R. 1955 M.B. 214.

Appeals against the order of the Motor Accidents Claims Tribunal, Madras dated 28th November, 1969 and made in O.P. No. 153 of 1967.

U.N.R. Rao and *M. Gopinathan*, for Appellant.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—These two Civil Miscellaneous Appeals are out of O.P. No. 153 of 1967 on the file of the Motor Accidents Claims Tribunal, Madras. The appellant in C.M.A. No. 332 of 1971 by name Dorairaj filed the claim petition under section 110-A of the Motor Vehicles Act for compensation in respect of injuries sustained by him in a motor accident which occurred on the Mount Road on 19th November, 1966 at about 8.50 A.M. Originally he claimed a total sum of Rs. 48,000 towards compensation but later he was allowed to amend the petition making a claim of total compensation of Rs. 1,30,000. The respondent to the petition is the State of Madras by Commissioner of Police, Madras, the Motor Vehicle involved in the accident being a police van. The Tribunal below awarded a total sum of Rs. 10,000 in favour of the claimant, Rs. 4,000 towards monies spent by the claimant for treatment, etc., Rs. 1,000 towards monies spent by him in respect of his betrothal ceremony which took place some time prior to the accident and a sum of Rs. 5,000 towards permanent disability, physical

* A.A.O. Nos. 332 and 456 of 1971. *7th March*, 1973.

and mental pain and for loss of promotion. C.M.A. No. 332 of 1971 is filed by the claimant praying for enhancement of the compensation. The other Civil Miscellaneous Appeal is filed by the respondent to the petition contending the claimant was not entitled to any compensation on the ground that the accident was not as a result of rash and negligent driving of the police van.

2. The first question that arises in these two Civil Miscellaneous Appeals is whether the accident was a result of rash or negligent driving of the police van bearing registration No. MSR 1953. The accident occurred near Saidapet Police Station where the road runs north to south. The police van in question was originally parked in front of the police station which is west of the road, facing east. The road at the place in question is 48 feet 6 inches wide. The police van was parked on the western extremity of the road just in front of the police station. Dorairaj, the claimant, was going in his Scooter from south to north. When he was approaching the place where the lorry had been parked, the driver of the van started it and took a 'U' turn in order to go southwards. (Originally the van was facing north). According to the claimant, the driver of the van did not give any indication whatsoever that he was taking a turn and that the van was so turned all of a sudden, there was an impact of the two vehicles in which the claimant's left leg was severely injured. The case of the State of Madras (who would hereinafter be referred to as the respondent) has been that the driver of the police van took the 'U' turn only after giving all necessary signals and taking the precaution that there was no traffic coming from south and approaching the van and that the impact between the two vehicles happened only because of the rash and negligent driving of the Scooter of the claimant. The material evidence regarding the accident is that of the claimant as P.W. 1, that of Ramanujam, the driver of the van, as R.W. 1 and that of Arumugam, a police constable who was in the police van, as R.W. 2. Seethapathi (P.W.4), a Head Constable of Police, investigated the accident, drew the rough plan Exhibit P-31 and ultimately charge-sheeted R.W. 1, the driver of the van, for causing hurt by rash and negligent driving. However, R.W. 1, had been acquitted by the criminal Court.

3. From the evidence on record it is quite clear that the accident was brought about only by the rash and negligent driving of the police van. R.W. 1 the driver of the van, would say that before he was about to take the 'U' turn, he actually looked up to see whether any other vehicle was approaching the place from south, that for a distance of about 100 yards there was no vehicle, at all and only then he turned his van after showing the necessary signals. The Tribunal below has rightly rejected this version of R.W. 1. If really R.W. 1 had looked up to see whether any vehicle was approaching the place from south and there was no vehicle for a distance of about 100 yards, it was impossible for the Scooter coming into contact with the police van. The evidence of the claimant as P.W. 1, that he was driving the scooter only at a speed of 20 miles per hour has not been challenged. If really when the police van was about to be turned, the scooter was 100 yards away from the van on its south, at the speed in which it was driven, the scooter could not have reached the spot before ever the police van took its full 'U' turn, went to the eastern part of the road and proceeded southwards. Though R.W. 1 as well as R.W. 2 would try to say that by the time the impact happened, the police van had actually turned southwards, having taken the full 'U' turn, the report given by R.W. 1 after the accident (Exhibit P-35) makes it clear that the impact between the two vehicles was only when the van was half way through the 'U' turn. If the scooter was more than 100 yards south of the van, by the time the van was half way in taking the 'U' turn, the scooter could not have reached the spot and the impact between the two vehicles could not have happened. The evidence of the claimant as P.W. 1 is that only when the scooter was close to the place where the police van had been parked, that the vehicle was started and the driver of the van, without giving any signal, turned the van all of a sudden and therefore he (claimant) could not avoid a collision between the two vehicles, even though he tried to swerve and go to his right. The Tribunal below has believed the version of P.W. 1 in this respect and we see no reason to differ

from that. Even assuming R.W. 1, the driver of the van, showed signal before he tried to take the 'U' turn, that by itself would not absolve him from the guilt of driving the vehicle rashly and negligently, unless he had made sure that no vehicle proceeding from south was approaching the place at that time. If the scooter was already nearing the place, the scooter driver would be helpless if the police van had been turned all of a sudden, even though the driver of the van might give the proper signal at the time of so turning. The driver of the motor vehicle which was originally stationary, owes a duty not only to give the proper signal before he tries to take a 'U' turn, but he should also see that there was no other vehicle which has already come very close to the place in question, for the driver of a vehicle which has already come close to the place could not bring his vehicle to a stop all of a sudden. In other words, the driver of the vehicle, which had been originally stationary, should try to turn the vehicle only when the road is clear and there was no vehicle on the move for some distance from the place. We are satisfied that the impact between the two vehicles had occurred only because the police van had been turned all of a sudden after the scooter had come very close to it and the evidence of P.W. 1 that the police van driver did not even show any sign before turning, is also acceptable.

4. The other question is about the quantum of compensation. After the amendment of the petition, the claim consisted of Rs. 15,000 for hospital and other charges, Rs. one lakh for loss of employment, permanent disability to drive a scooter, physical and mental discomfort and torture and Rs. 15,000 towards the cancellation of the claimant's marriage as a result of the accident making up in all a sum of Rs. 1,30,000. This claim is undoubtedly very much exaggerated. But at the same time, from the evidence on record, we are satisfied that the sum of Rs. 10,000 fixed by the Tribunal below as the total compensation payable to the claimant is too low and it calls for enhancement.

5. The claimant was aged about 28 years on the date of accident. He is an employee in the company Heatly and Gresham Limited, as a Junior Engineer in charge of sales. He is not an Engineering graduate but a diploma-holder. His basic pay on the date of accident was Rs. 188 per month and he was drawing a total sum of Rs. 490 per month which included Rs. 302 towards dearness allowance. Admittedly he had received severe injuries on his left leg. There was compound fracture of both the bones of the left leg, the bones having broken at more than five places and he was an in-patient in the Madras General Hospital for about 14½ months, (*i.e.*) from 19th November, 1966 till February, 1968. For proper immobilisation of the injured limb, he had to be in plaster of Paris up to his neck for six months and thereafter the plaster was reduced from neck to hip. On 24th November, 1966, pin traction was done. Again, on 13th June, 1967, an operation was performed and a fragment of the fractured fibula to a length of 4 to 5 inches (left leg) was removed. Naturally, he had to be put under anaesthesia every time when the plaster was changed or operation was performed. In spite of all the treatment, the left leg has become shorter by 1½ inches and the knee has also become stiff. He has to walk with the aid of a stick and certainly he cannot ride a scooter. Dr. Muthukumaraswami (P.W. 2) was the Medical Officer who attended on the claimant and his evidence on the above aspects is not challenged.

6. Considering the nature of the injuries, what is the proper quantum of compensation payable to the claimant, is the question. There cannot be much of dispute regarding the special damages of Rs. 5,000 awarded by the Tribunal below. The claimant has given a statement of account as per Exhibit P-2 regarding the alleged expenditure that he incurred while he had been hospitalised. There he has shown a total expenditure of over Rs. 13,000. But the Tribunal below is justified in disallowing several of the items mentioned therein and also in its observation that the expenditure shown is exaggerated and extravagant. The actual hospital bills paid by the claimant come to Rs. 2,166-28. The claimant has stated that a sum of Rs. 110 per month had been spent for attending on him

while he was in the hospital. There is no voucher for having paid Rs. 110 per month to any attendant. Even so, considering the nature of the injury, it cannot be said that the claimant required no assistance during the period when he was an in-patient in the hospital. Therefore some amount has to be allowed as the charges for the assistant. We think a sum of Rs. 75 per month can be allowed for such charges. The claimant ought to have spent some money for extra nourishing food. Under these circumstances, the sum of Rs. 4,000 fixed by the Tribunal below as the amount payable to the claimant towards special damages for expenses actually incurred is correct and we accept the same. There is also no dispute now that the claimant's marriage had been fixed to take place on 26th February, 1967, and because of the accident, that marriage did not come off. Earlier to the accident, there had been betrothal ceremony and the Tribunal below has fixed the expenses incurred by the claimant at Rs. 1,000 and that amount has been awarded as damages suffered by the claimant due to the accident. This finding of the Tribunal below is not challenged by either party. Therefore we accept the finding of the Tribunal below that a total sum of Rs. 5,000 is payable to the claimant towards special damages.

7. The dispute is only regarding general damages. As we said, the Tribunal below has awarded a consolidated sum of Rs. 5,000 for permanent disability, physical and mental discomfort and loss of promotion and we think this is too conservative an estimate. Considering the nature of the injuries and the admitted fact that the claimant had to be an in-patient in the hospital for about 14½ months, we think a sum of Rs. 3,000 can be awarded towards pain and suffering that the claimant underwent during that period. We are also of the view that the claimant should be awarded a sum of Rs. 7,000 towards loss of salary during the period when he was not able to attend his office (which is really special damages), and another sum of Rs. 10,000 should be awarded for loss of future promotional prospects.

8. It is not seriously contended before us that a certain sum should be awarded as compensation for pain and suffering undergone by the claimant and surely a sum of Rs. 3,000 cannot be said to be excessive under this head considering the nature of the injuries and suffering which the claimant should have undergone as a result of the injuries.

9. But the question whether the claimant is entitled to any amount towards loss of salary is disputed. The contention on behalf of the respondent is that there was no loss of salary at all even though the claimant was not in a position to attend his office for the 14½ months when he had been hospitalised and for some time more even after he was discharged, for the claimant's employer never withheld his salary and throughout the period the employer had been paying his salary. The contention is that when the employer has paid the salary of the claimant in spite of the latter having not gone to the office, the claimant has not suffered any loss. But from the evidence on record it is quite clear that the claimant was entitled to salary as a matter of right from his employer only for one month during the period when he did not attend office, that for the rest of the period he had no right to claim the salary from the employer and the payments made by the employer were only gratuitous, that the claimant has a moral obligation, though not a legal one, to refund that amount to the employer and that therefore the amount so paid by the employer gratuitously cannot be taken into consideration in assessing the damages payable by the wrongdoer. The leave rules governing the employees of the company in question (Heatly and Gresham Ltd.) have now been filed in the case and we also allowed certain other records consisting of the correspondence between the Madras Office of the company and its head office at Calcutta to be filed and also examined one Mr. Niranjan, the Manager of the Madras office of the company, as an additional witness. It is clear from the evidence now on record that the Madras office had been paying the monthly salary to the claimant, even though he was in hospital and not attending office, only on compassionate grounds. According to the leave rules, an employee of the company is entitled only to 30 days in a year as sick leave. Therefore, only for one month the claimant could be

granted sick leave with pay. For the period beyond the limit of 30 days, the claimant was not entitled to salary. However, the Madras office had been paying his salary gratuitously and the correspondence shows that the head office of the company at Calcutta had asked for explanation as to how salary was being paid to the claimant while he was in the hospital. Ultimately, by their letter dated 1st February, 1968, the head office at Calcutta stated that the salary for January, 1968 and thereafter should not be paid to the claimant and in fact it had not been paid. Only up to the end of December, 1967 the salary was being paid. When the payment so made was only gratuitous and not as a matter of right to the claimant, the question is whether the wrongdoer can take advantage of such payment. We are of the opinion that he cannot do so.

10. In *Liffen* v. *Watson*[1], a domestic woman servant, who had been receiving from her employer a wage of £ 1 a week plus free boarding and lodging, was injured in an accident and while she was under treatment she was living with her father to whom she made no payment for boarding and lodging. In an action by her against the wrongdoer, whose negligence caused the accident the Court of Appeal in England held that the injured was entitled to recover damages not only in respect of her loss of wages but also in respect of the loss of free boarding and lodging which her employer had been providing her. It was pointed out that the fact that during the period when the employer was not giving her free boarding and lodging, she had received such free boarding and lodging from her father is no ground to disallow the claim for loss of free boarding and lodging. Slesser, L.J., observed that if the claimant's father has provided her with board and lodging in his home, that is no reason why she should not be heard to say that her loss of the board and lodging previously provided by her employer was as much a loss to her as if she had lost the actual sum in money, for a wrongdoer must recompense a plaintiff for all the damages which naturally flow from the wrongdoing.

1. (1940) 1 K.B. 556.

11. *Dennis* v. *London Passenger Transport Board*[1], is a case where a person who was injured in an accident, which was a result of wrongful act on the part of the defendant, during the period when he was out of employment had received certain amount from the Minister of Pensions and certain amount from his employers themselves and all the amounts so received equalled his wages which he would have earned if he had gone to work. But the Court of Appeal held that the amount so received by the injured should not be taken into consideration is awarding the special damages payable by the wrongdoer. Denning, J., observed that a wrongdoer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages and that in point of law the plaintiff should have his wages paid by the wrongdoer as he has lost the same. It is also observed that plaintiff was under a moral obligation to refund the amounts to the Minister of Pensions and the plaintiffs' employer, *viz.*, the London County Council, on his getting damages from the wrongdoer to recompense him towards loss of wages. In *Mayne and McGregor on Damages* (twelfth edition), page 663, paragraph 773, the above cases are referred to and it is stated that even if there had been no expectation of repayment on the part of the benefactors, it would seem that principle demands that there should still be no reduction in the damages, as recompense to employers should depend only on the conscience of the plaintiff. Therefore even if there was no moral obligation on the part of the injured to refund the amounts to the persons who had paid him and even if there was no chance of the injured so repaying, the wrongdoer cannot be heard to say that there was no loss of wages and that therefore he would not recompense the injured. Thus it would be clear that in cases where the injured receives payment or other benefit gratuitously which might equal his wages, such payments are not to be taken into consideration in assessing the liability of the wrongdoer to recompense the injured regarding loss of wages.

12. There is another line of cases which say that even if the payments received by the injured were not gratuitous and

1. (1948) 1 All E.R. 779.

that the injured had a right to receive the payment, still those payments are not to be taken into account in assessing damages payable by the wrongdoer if such payments are due not as wages or salary but such as disability pension, etc. In *Payne* v. *Railway Executive*[1], a sailor serving in the Royal Navy was injured while travelling in a railway train and he became an invalid and therefore received a disability pension from his employers. Such pension was payable to him under an order in Council which corresponded to the relevant Royal warrant. The Court held that in assessing the damages payable by the wrongdoer, the plaintiff's disability pension could not be taken into consideration in reduction of damages since the plaintiff became entitled to the pension by reason of his naval service, it being one of the benefits such service affords. It was again pointed out that just as a wrongdoer cannot appropriate to himself insurance monies (the benefit of premiums paid by the injured party to cover accident risks), so he cannot appropriate benefits arising from the service of the injured party which similarly entitled him to those benefits. *Judd* v. *Hammersmith, etc., Hospitals*[2], applied the principle stated in the above case. In *Perry* v. *Cleaver*[3], the House of Lords also held that disablement pension paid to the injured should not be deducted from the damages payable by the wrongdoer as such pension was in the nature of deferred wages payable under a contract of employment for past service.

13. However, in *Browning*, v. *War Office*[4], the Court of Appeal held that the veteran's benefit received by the injured in that case, who was a person serving in the United States Air Force in England, should be taken into account in assessing the damages to which the plaintiff was entitled in respect of financial loss. In this case, *Payne* v. *Railway Executive*[1], has not been followed. This decision appears to go *contra* to the decision of the House of Lords in *Perry* v. *Cleaver*[3].

14. Anyway, in the present case, we are not concerned with the question whether payments like disability pension or veteran's benefit, etc., to which the injured is entitled as a matter of right, should be taken into consideration in assessing the damages payable by the wrongdoer. As we said earlier, the payments received by the claimant in this case, except for a period of 30 days after the accident, were only gratuitous payments made on compassionate grounds. The law is quite clear that such gratuitous payment should not be taken into consideration in assessing the damages payable by the wrongdoer.

15. In *Samaraj Oil Mills and Fertilisers and others* v. *D. Kothandaraman*[1], Ramaprasada Rao, J. held that the expenses of treatment of the injured which had been reimbursed by his employer as per the service rules cannot be recovered as part of damages from the wrongdoer. That again is a case where the injured was entitled to get a reimbursement of the medical expenses from his employer under the service rules. The payment by the employer was not gratuitous. Therefore this decision would not have any application to the present case. *Gwalior and Northern India Transport Company Ltd.* v. *Dinkar Joshi*[2], is a case where the injured got free treatment for his injuries through his Doctor-friends. At page 220, the Madhya Bharat High Court points out that the fact that the Doctors who treated the plaintiff on account of their friendship with him or for some other reason did not claim any fees from him, is a matter which is completely collateral to damage and if the plaintiff got free medical benefit, the wrongdoer cannot appropriate such benefit.

16. We hold that in the present case, the amounts paid by the claimant's employer gratuitously should not be taken into account in assessing the damages. It is admitted that a sum of Rs. 7,000 has been so paid gratuitously by the company Heatly and Gresham, Ltd. That amount cannot be deducted from compensation payable towards loss of salary. Therefore we hold that the claimant is entitled to a sum of Rs. 7,000 towards loss of salary.

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1. (1952) 1 K.B. 26: (1951) 2 All E.R. 910.
2. (1960) 1 All.E.R. 607.
3. (1969) A.C.J. 363.
4. (1962) 3 All E.R. 1089.

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1. (1970) A.C.J. 405.
2. A.I.R. 1955 Madh. Bharat 214.

17. The only remaining question is whether the claimant has lost promotional benefit and if so, to what extent. As the evidence regarding this aspect was not quite satisfactory, we allowed additional evidence eing recorded before us and as already mentioned, Mr. Niranjan, the Manager of the Madras Office of Heatly and Gresham Ltd., has been examined before us. But even his evidence is not very helpful. When the learned Counsel for the claimant examined the witness, he no doubt stated that prior to the accident there was a proposal to promote the claimant to a senior post carrying very high salary and that because of the accident, that proposal had been dropped. But from the answers he gave in cross-examination by the Additional Government Pleader for the respondent, it is quite clear that what he said earlier is only hearsay and that he does not know anything personally about the alleged proposal to promote the claimant to a senior post. Admittedly there has been no break of service for the claimant. After hospitalisation and recoupment, the claimant has been allowed to work in the same post which he originally occupied. The staff service record, which is one of the additional documents filed before us shows that till 1970, the caimant had been receiving only the same salary which he had been receiving prior to the accident. As we said, the basic salary on the date of accident was. Rs. 188. He had been receiving the same salary till September, 1970 though the dearness allowance had been increased from Rs. 295 to Rs. 317 by that time. In October, 1970, the company has given him an increment and he drew in all a sum of Rs. 655. In October, 1971, this amount was raised to Rs. 755 and in October, 1972, the total emoluments came to be increased to Rs. 855 per month. It is clear from the evidence that the employer-company is not expected to give increments every year. It is all in the discretion of the employer. It is not possible to say that the claimant had not got increment after the accident and up to September, 1970, only because he had been injured. From the evidence of Mr. Niranjan, it is clear that the claimant is holding the same post which he held prior to the accident.

18. Though there is no evidence to show that but for the accident the claimant would have been promoted to a higher post, it is not unreasonable to hold that the claimant has, as a matter of fact, lost promotional prospects to a certain extent. The employer-company is dealing in sophisticated machinery. The claimant, as a Junior Engineer-cum-salesman, is expected to move around, meet people, discuss with them and push the goods of his employer. As the claimant has been permanently disabled due to the shortening of his left leg and he is not in a position to ride a scooter, he cannot be expected to go out freely for canvassing orders. In this background, naturally the promotional prospects of the claimant are affected As a matter of fact, the Tribunal below has stated that it cannot be disputed that the claimant lost his chances of getting promoted to a higher post due to the permanent disability he suffered. Under these circumstances, we think it is not unreasonable to hold that the claimant has lost about Rs. 50 a month on an average for the rest of his service. As lump sum payment towards such loss is being made, we consider that a sum of Rs. 10,000 on this ground would be a just and proper estimate of the loss suffered by the claimant. That means, the claimant is entitled to a total sum of Rs. 20,000 apart from the sum of Rs. 5,000 awarded towards hospital charges, etc. and other expenditure incurred by the claimant.

19. In the result, C.M.A. No. 332 of 1971 is partly allowed and the award is modified in that the respondent shall pay the claimant a total sum of Rs.25,000 as compensation, which amount shall be paid within one month from this date. C.M.A. No. 456 of 1971 is dismissed. There would be no order as to costs in C.M.A. No. 456 of 1971. The injured to get proportionate costs in C.M.A. No. 332 of 1971.

P.S.P. ——— *C.M.A. No.* 332 *of* 1971 *partly allowed and C.M.A. No.* 456 of 1971 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*P. R. Gokulakrishnan, J.*

K. Ramalingam and others .. *Petitioners**

v.

K. N. Krishna Reddi and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 35 and 95—Suit for declaration and possession—Decree—Execution — Del very athakshi —Whether actual possession g'ven—Dispute—Grant of interim stay pending second appeal on allegation of continuance in possession by judgment-debtor—Petition for revocation—Maintainability—Report from trial Court as to person in actual possession, if can be called for—Effect of finding.

Where delivery of possession in execution of a decree was alleged to be only a paper delivery and not actual physical delivery, it cannot be said that the decree has been executed in full until the Court satisfies itself that there has been a real actual physical delivery in execution.

[*Para.* 10.]

Once it is found that no actual possession has been given in accordance with an order passed under Order 21, rule 35 Civil Procedure Code, there cannot be finality in the execution proceedings and as such a subsequent application is maintainable for the execution of the decree. [*Para.* 11].

Calling for a report from the trial Court, when especially there is a delivery athakshi is not warranted in every case where the judgment-debtor-petitioner claims to be in actual possession and alleges that the execution delivery was only a paper delivery. But in appropriate cases where the party seems to be in possession throughout and has also obtained interim stay and the time-lag between the alleged delivery and the grant of stay is short and the Court feels that an enquiry is necessary to find out who is in actual possession, the Court is not barred from calling for a report from the trial Court in the interests of justice. [*Para.* 7].

Where the very question whether possession was actually handed over in the execution taken out is agitated later, any conclusion subsequent to the calling for of the report from the trial Court will be binding upon the parties and if the finding is that no actual physical possession was given, there is no bar for a subsequent execution petition.

[*Paras.* 13 *and* 17.]

Cases referred to:

Gopal Das v. *Than Singh*, (1882) I.L.R. 4 All. 184; *Thandavaroya Mudali* v. *Subramania Gurukkal*, A.I.R. 1916 Mad. 930 (1) : 29 M.L.J. 504 : 32 I.C. 44; *Chokkalinga* v. *Gopalathathachariar*, A.I.R. 1917 Mad. 202; *Theevana Pillai and another* v. *Kulla Pillai etc.*, (1910) 7 M.L.T. 107; *Venkatalakshmi* v. *Sadasiva Aiyar*, A.I.R. 1924 Mad. 200; *Kunhamu* v. *Mammu Beary*, (1962) K.L.T. 764; *Shew Bux Mohata* v. *Bengal Breweries Ltd.* A.I.R. 1961 S.C. 137 : (1961) 1 S.C.J. 322: (1961) 1 S.C.R. 680; *Maharaja Jagadish Nath Roy* v. *Nafar Chandra Parmanik*, (1932) 36 C.W.N. 12; *Radhalal* v. *Chabilchand*, A.I.R. 1955 Nag. 79; *Jaimal Singh* v. *Rakha Singh*, A.I.R. 1957 Punj. 17; *Ramaganesan* v. *Rajah Ayyar*, A.I.R. 1964 Mad. 53:(1963) 2 M.L.J. 162: I.L.R. (1963) Mad. 911; *Manikayala Rao* v. *Narasimhaswami*, A.I.R. 1966 S.C. 470: (1966) 1 S.C.R. 628; *G. Das* v. *Fatik Chandra*, A.I.R. 1957 Assam 123.

C.M.P. No. 3:28 *of* 1973:

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to stay the execution of the decree in O.S. No. 370 of 1968 on the file of the Court of the District Munsif, Sholinghur, as reversed by the decree dated 21st October, 1972, in A.S. No. 358 f 1971 on the file of the Court of the Subordinate Judge, Vellore, pending S.A. No. 295 of 1973 preferred to the High Court against the decree cf the Court of the Principal Subordinate Judge, Vellore dated 21st October, 1972 and passed in A.S. No. 358 of 1971 (in O.S. No. 370 of 1968, D. M. C., Sholinghur).

C. M. P. No. 4849 *of* 1973:

Petition presented to the High Court to vacate the interim stay granted by the

* C.M.P. Nos. 3428 and 4849 of 1973 in S.A. No. 295 of 1973. *18th July*, 1973.

order of the High Court, dated 27th March, 1973, and made in C.M.P. No. 3428 of 1973.

N. Vanchinathan, for Petitioners.

Nainar Sundaram, for Respondents.

The Court made the following

ORDER.—Defendants 2 to 4 are the appellants in the second appeal. The first respondent therein filed O.S. No. 370 of 1968, on the file of the Court of the District Munsif of Sholinghur for declaration of his title to the suit property and for possession alleging that he purchased the property from the appellant's father on 5th September, 1967. The appellant's father is dead. The appellants resisted the suit contending *inter alia* that the sale deed has not been executed by them and that the said deed is vitiated by fraud and misrepresentation. The trial Court dismissed the suit. On appeal, the lower appellate Court decreed the suit. Aggrieved by the said decision of the lower appellate Court, defendants 2 to 4 have come up in second appeal.

2. Along with the second appeal, the appellants filed C.M.P. No. 3428 of 1973 for grant of interim stay alleging that they are in possession of the suit property and that in order to protect their possession stay of the operation of the decree of the lower appellate Court has to be granted. This Court granted interim stay on 27th March, 1973, while admitting the second appeal.

3. The respondent in the second appeal filed C.M.P. No. 4849 of 1973 for vacating the interim stay on the ground that he has taken possession of the property as early as on 13th March, 1973 in E.P. No. 150 of 1973 pursuant to the decree of the lower appellate Court and that there was nothing to be stayed. In reply to this allegation, the appellants have filed an affidavit stating that there is no actual physical delivery of the suit property, that the appellants only are in possession of the property and that the executing Court has not recorded the 'delivery' as yet.

4. Thiru Vanchinathan, the learned Counsel appearing for the appellants (petitioners in the stay petition) submitted that a report may be called for from the trial Court as to who is in actual possession of the suit property. He also submitted that his clients are in possession continuously and that so far they have not been dispossessed from the suit property.

5. Thiru Nainar Sundaram, the learned Counsel appearing for the respondent (respondent in the stay petition) relied upon the delivery athakshi and stated that much earlier to the order of stay granted by this Court delivery had been effected through Court to his client. He also submitted that once the decree has been executed, this Court cannot put the appellants back in possession and that that may cause prejudice and loss to the respondent inasmuch as he cannot once over execute the decree which has been already executed in full.

6. Taking into consideration the representation made by the appellants and also the fact that they were, and also continue to be, in possession as alleged by them, throughout, I am inclined to call for a report from the trial Court as to who is in actual possession of the suit property. Meanwhile I also like to maintain the *status quo* as on date.

7. Calling for a report from the trial Court, when especially there is a delivery athakshi is not warranted in every case where the stay petitioners allege that they are in actual possession and that the delivery is only a paper delivery. But, in appropriate cases, where the party seems to be in possession throughout and has also obtained an interim stay from Court, and the time-lag between the alleged delivery and the grant of stay is short, and the Court, on relevant facts, feels that an enquiry is necessary to find out as to who is in actual possession, I do not think the Court is barred to have a report from the trial Court in the interests of justice.

8. Nevertheless, it is necessary to examine the submission made by Thiru Nainar Sundaram appearing for the respondent to the effect that such an enquiry will bar any subsequent execution petition that might be filed by the respondent.

9. Order 21, rule 95 (1), Civil Procedure Code, deals with delivery of

property in occupation of the judgment-debtor. It contemplates actual physical delivery after removing any person who refuses to vacate the same.

10. Thiru Nainar Sundaram first cited the decision in *Gopal Das* v. *Than Singh*[1]. That was a case in which the plaintiff-appellant got possession of the property as per law; subsequent to that possession, the defendant entered into possession and cultivated the lands, and the subsequent execution petition by the plaintiff, who originally filed the suit for possession, was rejected on the ground that the order of execution was complete as early as 7th March, 1877. Thus, it was a clear case wherein possession had been handed over legally and actually and subsequent to that possession the defendants had taken possession of the property. In such circumstances, there is no difficulty in upholding the principle that no second execution will lie after the satisfaction of the decree entered completely in the prior execution petition. In such cases, a suit alone will lie. Correctly the Bench of the Allahabad High Court has decided so; and I do not think that the said facts are present in the present case. Here, the contention of the appellants is that the decree has not been executed and that the alleged delivery of possession by way of execution is only a paper delivery, and not actual physical delivery. In such a case, it cannot be said that the decree has been executed in full until the Court satisfies itself that there has been a real actual physical delivery in execution of the decree as claimed by the decree-holder.

11. The decisions cited by Thiru Nainar Sundaram, such as *Thandavaroya Mudali* v. *Subramania Gurukkal*[2], and *Chokkalinga* v. *Gopalathathachariar*[3], clearly hold that a decree-holder is not entitled to file a second execution petition for possession under Order 21, rule 35, Civil Procedure Code, after he has been put in possession in accordance with an order passed in an application under the same Order and Rule. These decisions also follow *Gopal Das* v. *Than Singh*[1]. It is clear from above decisions that once it is found that there is no actual possession given in accordance with an order passed on an application under Order 21, rule 35, Civil Procedure Code, there cannot be any finality in the execution proceedings and as such a subsequent application is maintainable for execution of the decree.

1. (1882) I.L.R. 4 All. 184.
2. 29 M.L.J. 504 : 32 I.C. 44 : A.I.R. 1916 Mad. 930 (1).
3. A.I.R. 1917 Mad. 202.

12. The decision reported in *Theevana Pillai and another* v. *Kulla Pillai etc.*[1], is a case where the plaintiff got a decree for possession and took possession in execution. Subsequently the defendants took possession but without applying for execution. On second appeal, the original decree was confirmed. The question was whether the plaintiff was entitled to execute the final decree to get possession of the land. The Court held—

> "If the defendants had taken possession by process of execution there can be no doubt that the plaintiff could have got possession in execution under the provisions of section 583, Civil Procedure Code. We do not think the plaintiffs should be put in a worse position, because the defendants took possession without the intervention of the Court and in defiance of an order of the Court staying execution".

On the above observations, the second execution petition was found to be in order.

13. In *Venkatalakshmi* v. *Sadasiva Aiyar*[2] a Bench of this Court held—

> "Even where the decree-holder has got possession in execution of the original decree if subsequently he was wrongly dispossessed before the final decree of the Appellate Court restored the original decree of the District Munsif he would be entitled to apply for delivery of possession a second time".

In *Kunhamu* v. *Mammu Beary*[3], it has been specifically observed by Raman Nayar, J. that—

> "The question whether in cases where the delivery is only symbolical or has proved ineffective, a second order for delivery will lie does not arise in this

1. (1910) 7 Mad.Law Times 107.
2. A.I.R. 1924 Mad. 200.
3. (1962) K.L.T. 764.

case, the delivery made being admittedly actual and effective, and it is not necessary to notice the conflict of authority on this point".

In the present case, the main question is whether actual delivery has been effected or not. Hence I do not think that the decision in the said case can be quoted as authority applicable to the present case. Apart from that, the learned Judge has also observed thus:

"Unless the appellate Court has expressly taken cognizance of a subsequent event and given relief in respect of it, its decree can, after all, relate only to a cause of action in existence at the time of the institution of the suit. It is not the case that in this particular case the appellate Court took note of the subsequent dispossession and granted relief in respect of of it, and hence its decree can relate only to the dispossession before the the suit in respect of which the decree had already been executed".

As far as the present case is concerned, the very question whether possession has been actually handed over in the execution petition as alleged, is being agitated now. As such, any conclusion made subsequent to the calling for of the report from the trial Court will be binding upon the parties and in case it is found that actual possession has not been given in the said execution petition, there is no question of any bar for a subsequent execution petition, which, in my opinion, cannot be termed as a 'second' execution petition

14. Thiru Nainar Sundaram, the learned Counsel appearing for the respondent cited *Shew Bux Mohata* v. *Bengal Breweries Ltd.*[1], wherein the Supreme Court has observed as follows:—

"It is true that the Nazir's return showed that defendant No. 4 had not been bodily removed. But the same return also shows that it had not been so removed because of a certain arrangement arrived at between it and the decree-holders and as the decree-holders had not required the removal of defendant No. 4 from the premises. Now under Order 21, rule 35, a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is what happened in this case. The decree-holders in the present case, of their own accepted delivery of possession with defendant No. 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on 8th September, 1949, on the basis that full possession had been delivered to them by defendant No. 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree-holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows, that it cannot be executed any more. In the case of *Maharaja Jagadish Nath Roy* v. *Nafar Chandra Parmanik*[1], an exactly similar thing had happened and it was held that the decree was not capable of further execution. It was there said at page 15:

'The case, therefore, seems to me to be one of those cases in which a decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second instalment asks for khas possession. The question is whether such a course is permissible under the law. I am of opinion that it is not.'

We entirely agree with the view that was there expressed".

1. (1961) 1 S.C.J. 322 : (1961) 1 S.C.R. 680 : A.I.R. 1961 S.C. 137.

1. (1932) 36 C.W.N. 12.

15. From the above stated Supreme Court decision it is clear that if the decree-holder is satisfied with alleged delivery of possession, whether physical or symbolical, he cannot on a subsequent date ask for actual possession by filing a second execution petition; subsequent execution petition can be entertained only in cases where there was no legal, complete or effective delivery of possession on the earlier occasion.

16. To the same effect are the decisions in *Radhalal* v. *Chabilchand*[1], *Jaimal Singh* v. *Rakha Singh*[2], *Ramaganesan* v. *Rajah Ayyar*[3], and *Manikyala Rao* v. *Narasimhaswami*[4], In *G. Das* v. *Fatik Chandra*[5], it has been held that if the fact was that actual delivery of possession was not obtained by the decree-holder in the previous execution case there was no justification for holding that the decree-holder would be deprived of his right to come before the executing Court and pray for a fresh delivery of possession when there was no other bar to his right of executing the decree.

17. Thus it is clear from the aforesaid decision that whatever may be the conflict between some decisions regarding filing an execution petition for a second time after the decree for possession has been satisfied, one thing is certain that if on the previous occasion there was no legal, complete or effective delivery, a second execution petition was not a bar. As far as the present case is concerned, the judgment-debtors (appellants) themselves accept the fact that there was no actual physical delivery given to the decree-holder. They have come forward with a specific case that the alleged handing over of actual possession is not true and that as a matter of fact they are in possession of the property. The only persons who could object to a second execution petition if filed, on the basis that the decree has already been satisfied, themselves state that there was no legal, complete or effective delivery of the property. In these circumstances there is absolutely no substance in the argument that a subsequent execution petition will be objected to as a bar as if it will be a second execution petition filed after the decree has been satisfied.

18. As regards the handing over of actual possession the facts of the case make it necessary to call for a finding from the trial Court as to who exactly is in actual possession of the property as on date. In the interests of justice and also to safeguard the possession of that party who is in actual possession as on date it is necessary to get a finding from the trial Court as regards the possession.

19. In these circumstances observing that the *status quo* as on date be maintained, I direct that the trial Court will submit a finding as to who is in actual possession of the property within a month from this date. The office is directed to send necessary papers to the trial Court for recording a finding.

P.S.P. ——— *Finding called for.*

1. A.I.R. 1955 Nag. 79.
2. A.I.R. 1957 Punj. 17.
3. (1963) 2 M.L.J. 162 : I.L.R. (1963) Mad. 911 : A.I.R. 1964 Mad. 53.
4. (1966) 1 S.C.R. 628 : A.I.R. 1966 S.C. 470.
5. A.I.R. 1957 Assam 123.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—G. *Ramanujam, J.*

A Dhoddiah Chettiar .. *Appellant**

v.

Madukkarai (Niligiris) Estates Tea Factory by its Managing Partner, T. K. Joghee Gowder and another .. *Respondents.*

(A) *Evidence Act* (*I of* 1872), *sections* 91, 92 *and* 99—*Document of sale reciting certain consideration—Real consideration alleged to be larger —Whether third party can invoke the principle of section* 92—*Impact of section* 99.

The principle of section 92, Evidence Act, cannot be applied to cases where the dispute is between a party to a document and a third party. This position is made clear by section 99 of the Act which permits a third party to lead evidence not only to vary but also to contradict or subtract from the terms of a document. [*Paras.* 5, *and* 7.]

(B) *Stamp Act* (*II of* 1899), *sections* 27 *and* 64—*Recital of consideration in document*

* S.A. No. 1398 of 1970. 23rd *November*, 1972.

alleged to be under-statement of value—Effect—Parol evidence to prove larger consideration not precluded.

Even if the parties to a document of sale understate the value of the property and pay a lesser stamp duty the instrument does not become void or inadmissible in evidence for that reason. Oral evidence to prove larger consideration is not precluded. Only, the parties to the document may be liable for punishment under section 64 of the Stamp Act for attempting to defraud the revenue. [*Para.* 9.]

(C) *Contract Act* (*IX of* 1872), *section* 23—*Applicability.*

Permiting parol evidence to show a larger consideration than that recited in a sale deed would not render the sale invalid for it recites a valid consideration though not the real consideration. Section 23, Contract Act will not stand in the way of the real consideration being established. [*Para.* 9.]

Cases referred to :—

Motilal Singh v. *Mt. Fulia*, A.I.R. 1958 Pat. 61; *Hira Devi* v. *Offcial Assignee, Bombay*, 1958 S.C.J. 766: (1958) S.C.R. 1384: 1958 2 An.W.R. (S.C.) 108; (1958) 2 M.L.J. (S.C.) 108: A.I.R. 1958 S.C. 448; *Parattakath Mayan* v. *Mummad Kunhi*, A.I.R. 1949 Mad. 852: (1949) 1 M.L.J. 382; *Bhagyalakshmamma* v. *Kamalammal*, (1953) 2 M.L.J. 249: A.I.R. 1954 Mad. 94; *Narasimhachari* v. *Indo-Commercial Bank Ltd.*, I.L.R. (1964) 2 Mad. 841 : (1965) 1 M.L.J. 371 : 77 L.W. 622 :A.I.R. 1965 Mad. 147 ; *Kasturi Bai* v. *Ramlal*, (1962) 66 C.W.N. 8; *Vilayat Husain* v. *Misran*, (1923) I.L.R. 45 All. 396; *Vide* Reference under Stamp Act, section 46, (1897) I.L.R. 20 Mad. 27; *Board of Revenue, Madras* v. *Venkataramana*, (1950) 2 M.L.J. 213:I.L.R. (1951) Mad. 119 : A.I.R. 1950 Mad. 738 ; *Scott* v. *Brown Doering Wo Nab & Co. Slaughter and May* v. *Brown Doering Wo Nab & Co.*,(1892) 2 E.R. 724; *Bhushayya* v. *Chinnappareddi*, (1959) 1 An.W.R. 550 : A.I.R. 1960 A.P. 39 ; *Basavayya* v. *Kotayya*, (1963) 2 An.W.R. 455 : A.I.R. 1964 A.P. 145; *Devachand* v. *Hirachand Kamaraj*, (1889) I.L.R. 13 Bom. 449 ; *Mohideen Bi Khatoon Bi*, (1966) 1 M.L.J. 291 : 29 L.W. 42 : A.I.R. 1966 Mad. 435; *Kirloskar Bros. Ltd.* v. *Commissioner of Income-tax, Bombay*, A.I.R. 1952 Bom. 306; *Felix Hadley & Co.* v. *Hadley*, (1898) 2 Ch. 680.

Appeal against the Decree of the Court of the District Judge, Coimbatore (West) in Appeal Suit No. 287 of 1966 preferred against the decree of the Court of the Subordinate Judge of Nilgiris at Ootacamund in Original Suit No. 168 of 1964.

T. R. Ramachandran and *T. R. Rajagopalan*, for Appellant.

Aiyar and *Dolia*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He filed a suit for recovery of a sum of Rs. 5,000 due under a dishonoured cheque Exhibit A-1 dated 10th October, 1961 issued in his favour by the second defendant as the managing partner of the first defendant firm. It is alleged by the plaintiff that 12-64 acres of tea garden belonging to him were conveyed to one T. K. Mani the nominee of the second defendant by a sale deed dated 7th July, 1961 for Rs. 15,000 that the second defendant paid Rs. 10,000 in cash and issued a post-dated cheque for Rs. 5,000 in the name of the plaintiff and that when the cheque was presented for payment to the State Bank of India, Coonoor on 11th October, 1961 it returned it with an endorsement "payment stopped by the drawer". The defendants admitted the issue of a cheque for Rs. 5,000 in favour of the plaintiff but contended that it is not supported by consideration. Their case was that the second defendant was proposing to purchase certain properties from the plaintiff's friend, one T. K. Mani who had nominally conveyed them to various persons in 'uly, 1961, that pending finalisation of the transaction between the second defendant and the said T. K. Mani a post-dated cheque was issued in the name of the palintiff in the first week of July, 1961 and that payment for the cheque was stopped because the said Mani did not complete the transaction as agreed by the first week of October, 1961.

2. The trial Court went into the question as to whether the cheque was issued towards part-payment of the consideration for the sale under Exhibit A-3 as alleged by the plaintiff or whether it was given as a security for performance of certain obligations undertaken by the said T. K. Mani as alleged by the defendants. After considering the evidence

on record, both oral and documentary, it came to the conclusion that the cheque Exhibit A-1 was given by the second defendant for the sale of the plaintiff's properties to T. K. Mani and that therefore, it was fully supported by consideration. In that view it decreed the plaintiff's suit as prayed for.

3. On appeal, the lower appellate Court, however, took a different view. It held that the cheque Exhibit A-1 was not supported by consideration but that it was issued as security for the due performance of the terms of the agreement entered into between the second defendant and the said T. K. Mani regarding the sale of certain properties. The lower appellate Court has taken the view that the cheque was not issued towards part of the consideration for the sale in Exhibit A-3 from the mere fact that the sale deed refers only to a consideration of Rs. 4,500 and that it is inconsistent with the plaintiff's case that the actual sale consideration was Rs. 15,000. It felt that it is not open to the plaintiff to contend that the sale consideration for sale under Exhibit A-3 was Rs. 15,000 in view of the specific recital in the document that the sale consideration was Rs. 4,500. It has relied on the decision in *Motilal Singh* v. *Mt. Fulia*[1], for holding that no oral evidence can be adduced regarding the consideration for a sale which is at varience with the recitals in the sale deed, and that in view of the said legal bar the plaintiff cannot contend that the consideration for the transaction under Exhibit A-3 was really Rs. 15,000 and not Rs. 4,500. It is mainly on this basis the lower appellate Court has held that the cheque Exhibit A-1 is not supported by consideration. On this part of the case the question to be considered is whether it is open to the plaintiff to prove and establish that the consideration for the sale under Exhibit A-3 was really Rs. 15,000 and not Rs. 4,500 as recited in the document.

4. Before proceeding to consider the said legal aspect it is necessary to analyse the evidence relating to the quantum of consideration for the sale under Exhibit A-3. The plaintiff as P.W. 1 has stated that the consideration was only Rs. 15,000 though a low value of Rs. 4,500 was shown in the document for the purpose of avoiding a higher stamp duty. He would further say that the second defendant paid him cash consideration of Rs. 10,000 and the balance of Rs. 5,000 by means of a cheque, Exhibit A-1. He would also say that the cheque was given on the pretext that the second defendant did not have sufficient cash with him to pay the entire consideration of Rs. 15,000. P.W. 2 is T. K. Mani the vendee under Exhibit A-3 who later on sold the property covered by Exhibit A-3 along with his other properties to the second defendant under Exhibit A-4. He has deposed that the sale consideration under Exhibit A-3 was Rs. 15,000 and that the second defendant paid a sum of Rs. 10,000 by cash and the balance of the sale consideration was paid by the cheque, Exhibit A-1. Explaining the circumstances under which the second defendant came to pay the sale consideration, he has stated that as there was a prior understanding between him and the second defendant for his purchase of the suit property along with others, the second defendant came to pay the sale consideration. It appears from the evidence of P.W. 2 that the properties covered under Exhibit A-3 is part of an estate called "Knoll Estate" in Coonoor consisting of 90-58 acres in extent. The estate was jointly purchased by T. K. Mani's grand-uncle Narayanaswami and one Rose Mary Dias on 25th June, 1920. After the death of Narayanaswami, T. K. Mani succeeded to the half share in the estate. Subsequently T. K. Mani sold some portion of the estate in small bits in favour of various parties, including the plaintiff. Exhibit A-2 dated 17th August, 1960 is the sale of 5 acres of land by the said T. K. Mani in favour of the plaintiff. Subsequently the second defendant seems to have approached T. K. Mani to repurchase the various items of properties sold by him and convey the entirety to him for a sum of Rs. 63,000. In pursuance of this arrangement, T. K. Mani not only got back the 5 acres sold by him under Exhibit A-2, but also another 7 acres and odd from the plaintiff under Exhibit A-3. As a matter of fact the second defendant had purchased all the items of properties of T. K. Mani under Exhibit A-4 on 11th September, 1961

1. A.I.R. 1958 Pat. 61.

in pursuance of the said arrangement. P.W. 2 has deposed that he sold the entire 45 acres to the second defendant for a sum of Rs. 63,000 but only a lesser consideration of Rs 30,000 was mentioned in Exhibit A-4 for the purpose of reducing the stamp duty. He specifically refers to the understanding between him and the second defendant that the latter should give Rs. 15,000 to the plaintiff for repurchasing the property from him and it was in pursuance of that understanding the second defendant paid a sum of Rs. 10,000 in cash and Exhibit A-1 a cheque for the balance of Rs. 5,000. According to him even in respect of the persons, from whom he purchased the other extents, it is the second defendant who paid the consideration. He has specifically denied that the cheque was given as a security to ensure his carrying out the terms of the understanding. A perusal of his oral evidence shows that no motive has been attributed against him. His evidence has not been challenged as interested. Therefore, there is no reason to doubt that the real sale consideration was only Rs. 15,000 and not Rs. 4,500 as recited in the document. As already stated, both the plaintiff and P.W. 2 the vendor and the purchaser, respectively had stated that the consideration agreed was only Rs. 15,000 and not Rs. 4,500. Their evidence has been specifically referred to and accepted by the trial Court. Even otherwise, the extent said to have been sold under Exhibit A-3 being 12—64 acres of tea garden it is quite possible that the real consideration was Rs. 15,000. The lower appellate Court has chosen to reject their evidence in this regard mainly on the ground that it is not open to them to go behind the recital in the sale deed. The question therefore, is whether the plaintiff is entitled to plead and establish that the consideration for the sale under Exhibit A-3 was Rs. 15,000 as against the sale consideration of Rs. 4,500 recited in the document.

5. As already stated, the lower appellate Court has relied on the decision in *Motilal Singh* v. *Mt. Fulia*[1]. In that case it was held that a statement in a document of sale that a consideration has been paid is really a recital and does not constitute one of the terms of the sale deed but that the amount of consideration is obviously a term of the sale deed and that therefore, it is not open to a party to set up and prove a variation in the amount of consideration. The decision in that case was based on section 92 of the Evidence Act which provides that when the terms of any contract, grant or, any other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, adding to or subtracting from its terms. In that case the dispute as to the terms was between the parties to the instrument, and therefore, section 92 came to to be applied. It is well established that the principle of section 92 cannot be made applicable to cases where the dispute is between a party to the document and a third party. In *Hira Devi* v. *Official Assignee, Bombay*[1], the Official Assignee moved the insolvency Court under section 55 of the Presidency Towns Insolvency Act for a declaration that a deed of gift executed by the insolvent in favour of his wife and sons was void. He let in oral evidence to show that the transaction evidenced by the deed of gift was in reality a transfer for consideration. The question arose whether section 92 of the Evidence Act would stand in the way. The Supreme Court on those facts expressed the view that the application of the rule contained in section 92 of the Evidence Act is limited to cases as between parties to the instrument or their representatives-in-interest that persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add or subtract from the terms of the document and that this position has been made absolutely clear by the provisions of section 99. According to the Supreme Court there can be no doubt that under section 99 a third party has got a right to lead evidence not only to vary the terms of the docu-

1. A.I.R. 1958 Pat. 61.

1. 1958 S.C.J. 766 : (1958) S.C.R. 1384 : (1958) 2 An.W.R. (S.C.) 108 : (1958) 2 M.L.J. (S.C.) 108 : A.I.R. 1958 S.C. 448.

ment but to contradict the said terms or to add to or substract from them. The relevant observations in that case are these:

"As a matter of fact, from the terms of section 52 itself, it is clear that strangers to the document are outside the scope of section 92; but section 99 has presumably been enacted to clarify the same position. It would be unreasonable, we think to hold that section 99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to the document or their representatives in interest. In our opinion, the true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative-in-interest, the restriction imposed by section 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative-in-interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or subtract from its terms. The rule of exclusion enunciated by section 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative-in-interest in the case of a dispute between the said party or his representative-in-interest on the one hand and the stranger on the other".

The same view has been earlier expressed by this Court in *Parattakath Mayan* v. *Mummad Kunhi*[1]. where Satyanarayana Rao, J. held that under section 92 the prohibition with reference to the proof of an oral agreement applies only as between the parties to the instrument or their representatives-in-interest and not between one of the parties to the instrument and a third party.

6. In *Bhagyalakshmamma* v. *Kamalammal*[2], here was an agreement for sale of a house for Rs. 2,625 and a sum of Rs. 350 was paid as advance on the date of the agreement. Subsequently the sale deed was executed with a recital that the sale consideration was only Rs. 1,000. The vendor filed a suit for recovery of Rs. 1,275 the balance of the agreed sale consideration. The suit was resisted by the vendee on the ground that he had paid the said sum of Rs. 1,275 also as further advance before the execution of the sale deed. He also raised a plea that it is not open to the vendor to contend that the sale consideration under the sale deed was different. It was held in that case that section 92 of the Evidence Act would not bar the plaintiff from proving that the consideration was Rs. 2,525 especially when there was evidence of a prior written agreement for sale, and that even public policy cannot be invoked to defeat a suit like the one in that case.

1. (1949) 1 M.L.J. 382 : A.I.R. 1949 Mad. 852.
2. (1953) 2 M.L.J. 249: A.I.R. 1954 Mad. 94.

7. Reference is made by the learned Counsel for the respondent to the decision of a Bench of this Court in *Narasimhachari* v. *Indo-Commercial Bank Ltd.*[1] where it has been held that under the terms of the proviso to section 92 of the Evidence Act while it will be competent to the party to a contract to adduce evidence to prove want of consideration or failure of consideration or a difference in kind of consideration specified in the document, it will not be competent for him to prove a variation of the quantum of consideration recited in the document and that to permit such a plea will plainly be against the specific terms of section 92. In that case section 92 was invoked against a party to the document. But as already stated, section 92 is inapplicable in cases where the dispute arises between a party to the document and a third party as in this case. Even as between parties to the document, it has been held in *Kasturi Bai* v. *Ramlal*[2], that when there is one consideration stated in the document evidence of any other consideration not in contradiction to that instrument is admissible, that it is not in contradiction to the consideration in the instrument to prove a consideration larger than that which is mentioned, and that section 92 of the Evidence Act cannot bar oral evi-

1. (1964) 77 L.W. 622 : I.L.R. (1964) 2 Mad. 841 : (1965) 1 M.L.J. 371 : A.I.R. 1965 Mad. 147.
2. (1962) 66 C.W.N. 8.

dence to prove further or additional consideration.

8. In view of the principles laid down in the above decisions it cannot be said that the plaintiff cannot establish that the real sale consideration was Rs. 15,000 as against the stated consideration of Rs. 4,500.

9. The learned Counsel for the respondents would further contend that permitting the plaintiff to adduce oral evidence to establish a different consideration than the one mentioned in the sale deed would defeat the provisions of the Stamp Act. Reference is made to sections 27 and 64 of the Stamp Act. Section 27 enjoins that the consideration and all other facts and circumstances affecting the chargeability of any instrument with duty, shall be fully and truly set forth therein, and section 64 makes the omission to comply with the provisions of section 27 penal and punishable. According to the respondents' learned Counsel the plaintiff being a party to a document which does not set forth full and true consideration is punishable under section 64, and therefore, he should not be permitted to take the plea that the real consideration is different from the stated consideration. But it has to be borne in mind that even if the parties understate the value of the property and pay a lesser stamp duty the instrument will not become void or inadmissible in evidence for that reason. The parties may be liable for punishment under section 64 for attempting to defraud the Revenue. Section 23 of the Contract Act has also been referred to in support of the contention that by allowing the plaintiff to adduce parole evidence to prove a different consideration than the one stated in the document would defeat the provisions of the Stamp Act Section 23 provides as to what consideration and objects are lawful and what are not. It states that if the consideration is of such a nature that if permitted, it would defeat the provisions of any law then it is not a lawful consideration. As already stated the sale deed as such cannot be said to be invalid for it recites a valid consideration though not the real consideration. I am, therefore of the view that section 23 of the Contract Act will not stand in the way of the plaintiff establishing the real consideration for the sale.

10. The respondents' learned Counsel has drawn my attention to the decision in *Vilayat Hussain* v. *Misran*[1], in support of his plea that the plaintiff cannot set up his own fraud against the statute. In that case it was held that in all cases where the plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence; that when those circumstances include an allegation of a joint fraud both by the plaintiff and defendant, the particulars of that fraud must be pleaded; and that if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, the duty of the Court is not to assist either party in enforcing the transaction. But in this case it cannot be said that by understating the amount of consideration in the document that transaction of sale is illegal and unenf rceable. (Vide Reference under Stamp Act, section 46[2] and *Board of Revenue, Madras* v. *Venkataramana*[3], Reference is also made to the decision in *Scott* v. *Brown Doering Wo. Nab. & Co., Slaughter and May* v. *Brown Doering Wo. Nab & Co.*[4]. In that case Lindley, L.J., expressed:

> "*Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the

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1. (1923) I.L.R. 45 All. 396.
2. (1897) I.L.R. 20 Mad. 27.
3. (1950) 2 M.L.J. 213 : I.L.R. (1951) Mad. 119: A.I.R. 1950 Mad. 738.
4. (1892) 2 E.R. 724.

illegality the Court ought not to assist him".

But the above observations indicate that that decision rested mainly on the fact that the contract sought to be enforced was tainted by illegality. But by no stretch of imagination the transaction of sale under Exhibit A-3 can be said to be illegal.

11. In *Bhushayya* v. *Chinnappareddi*[1], while dealing with the question whether non-showing of the full consideration in a sale deed will amount to "opposed to public policy" it was held that where the statute merely imposes a penalty without declaring a contract to be illegal or void, the imposition of penalty by itself does not have the effect of making the contract made in contravention of a specific provision of the statute illegal or void unless it is further shown that the statute was designed as a whole to further a public policy and that where the words of a statute leave room for doubt as to its intention, it is material to ask whether the object of the Act in imposing the penalty is merely to protect the revenue or whether its object is to protect the general public or some class of the general public. The above decision was followed in *Basavayya* v. *Kotayya*[2]. In *Devachand* v. *Hirachand Kamaraj*[3], it was held that the Indian Stamp Act being a fiscal enactment, its object is only to collect revenue and its provisions must be construed only in that light.

12. In this case if the cheque is held to have been given towards the balance of the real consideration, then it cannot be said that it is without consideration. In *Mohideen Bi* v. *Khatoon Bi*[4], it was held that issuing a cheque is as good as payment in cash. In *Kirloskar Bros. Ltd.* v. *Commissioner of Income-tax, Bombay*[5], Chagla, C.J. observed that:

> "It is also well-settled in commercial practice, as I shall presently point out, that a cheque is looked upon as a payment if a creditor accepts a cheque in place of the country's currency".

Benjamin on "Sale of personal property" at page 189 of the 8th edition states as follows:

> "......a man who prefers a cheque on a banker to payment in money is not considered as electing to take security instead of cash, for a cheque is accepted as a particular form of cash payment, and if dishonoured, the seller may resort to this original claim on the ground that there has been a defeasance of the condition on which it was taken".

Byles on "Bills of Exchange" at page 23 of the 20th edition enunciates the position of law that "a cheque, unless dishonoured, is payment". In *Felix Haeley & Co.* v. *Hadley*[1], it was expressed:

> "therefore the position in law seems to be that even when a cheque is accepted by a creditor as a conditional payment, the preference by the creditor of accepting a cheque rather than cash operates as a payment to the creditor when the cheque is given although the liability of the debtor may revive in the event of the cheque not being ultimately, cashed".

13. The view of the lower appellate Court in this case that the cheque is not supported by consideration based on its view that the plaintiff cannot establish the real consideration as against the stated consideration cannot be, therefore, supported. In the face of the evidence of the vendor and the vendee that the real consideration agreed between them was Rs. 15,000, it is not open to the second defendant to rely merely on the term of the sale deed reciting a lesser consideration and defeat the plaintiff on that ground. I am also inclined to accept the view taken by the trial Court that the cheque has been given by the second defendant only towards part payment of the sale consideration and not by way of security in respect of another transaction as alleged by the second defendant. As a matter of fact, there is absolutely no evidence to show, except

1. (1959) 1 An.W.R. 550: A.I.R. 1960 A.P. 39.
2. (1963) 2 An.W.R. 455 : A.I.R. 1964 A.P. 145.
3. I.L.R. (1889) 13 Bom. 449.
4. (1966) 1 M.L.J. 291 : 79 L.W. 42 : A.I.R. 1966 Mad. 435.
5. A.I.R. 1952 Bom. 306.

1. (1898) 2 Ch. 680.

the *ipse dixit* of the second defendant, that the cheque was given only as a security. The plaintiff had nothing to do with the arrangement between the second defendant and T. K. Mani, and it is not clear as to why the second defendant issued a cheque in favour of the plaintiff, who according to the evidence of the second defendant, is an utter stranger. I have to, therefore, set aside the finding of the lower appellate Court that the cheque is not supported by consideration.

14. The result is the second appeal is allowed and the decree and judgment of the lower appellate Court are set aside and those of the trial Court are restored. There will, however, be no order as to costs.

No leave.

P.S.P. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, J.*

M/s. Sampathkumaran & Co., Madras-2 .. *Petitioner**

v.

The Regional Commissioner for Provident Fund, Tamil Nadu and Pondicherry, Madras-14 .. *Respondent.*

Employees Provident Fund Act (XIX of 1952), *section* 1 (4)—*Proprietary company —Application to Regional Provident Fund Commissioner for inclusion as covered establishment —Subsequent change by company becoming a partnership—Right for withdrawal from liability to contribute to provident fund—Refusal of request—Enquiry under section 7-A—Order fixing quantum of contribution—Legality—* Certiorari—*Constitution of India, Article* 226.

The petitioner firm was originally a proprietary business with four employees. It applied under the Employees Provident Fund Act for inclusion as a covered establishment under section 1 (4). Later on the constitution of the firm was changed and the quandom proprietary firm became a partnership. The reconstituted firm applied for withdrawal of the firm and its employees from liability to contribute to the provident fund. The Regional Commissioner for Provident Fund refused the request on the ground that the partnership was formed subsequent to the notification made by the Government on the original request of the petitioner to come within the scheme of the Fund and it could not therefore go out of it. The Regional Commissioner held an enquiry under section 7-A of the Act and made an order fixing the quantum of contribution payable by the petitioner. Against these two orders a writ petition was filed.

Held: It is elementary that if a person or a body of persons can do an act for their benefit but contemporaneously burdened with obligations created by their voluntary act of commission, they would be in order at any time thereafter to seek for relief by once again expressing in unequivocal terms their desire not to be burdened any further with such liabilities or obligations. This is reflected in clause 21, General Clauses Act. [*Para.* 2.]

The petitioner is entitled to have a writ of *certiorari* issued since the order passed by the respondent is without jurisdiction and poses also an apparent error of law. The respondent is bound not only to entertain the application for withdrawal, but also accept the request for non-application of the provisions of the Act to the petitioner-company. [*Para.* 3.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent relating to his No. D3/TN/5367/Regl. dated 2nd March, 1971 and quash the same.

N.R. Chandran, for Petitioner.

K. Parasaran, Central Government, for Respondent.

The Court made the following

ORDER:—The petitioner is a firm of chartered accountants. One P.T. Sampath Kumaran was running the firm of M/s. Sampathkumaran & Co., as its

* W.P. No. 1143 of 1971.

19th February, 1973.

sole proprietor. He had on the rolls of his firm four employees consisting of one assistant, one manager, one stenographer and one peon. Under section 1 (4) of the Employees' Provident Funds Act, 1952, the petitioner-company along with its employees applied to the appropriate statutory authority under the Act for including the petitioner-company as a covered establishment thereunder, for the purpose of institution of a provident fund for its employees. Later, the constitution of the firm was changed on 1st April, 1969, when the quondam proprietary firm became a partnership one. On 11th April, 1969, the present petitioner-company after the reconstitution applied for withdrawal of the firm and its employees from the liability to contribute to the provident fund as required under the Act and sought for final orders thereon. The respondent would not permit the establishment to go out of the purview of the Act and he put it on the ground that the partnership was formed subsequent to the notification made by the Government of India on the original request of the petitioner to come within the scheme of the Fund and that therefore they cannot go out of it. By an order dated 13th October, 1970, while rejecting the request of the petitioner to cease its liability to contribute to the provident fund as required under the Act, the respondent proposed to hold an enquiry in terms of section 7-A of the Act. After such an enquiry, the challenged order was passed on 2nd March, 1971. The respondent submits that the notification covering the establishment under section 1 (4) of the Act was issued on 24th September, 1968 and that on that date, it was a partnership concern. Factually, this finding is not correct. He proceeded further and after examining other details, fixed the contribution payable by the petitioner-company. It is as against these two orders, the present writ petition has been filed.

2. The petitioner's case is that the respondent cannot refuse an establishment which joined the provident fund in the circumstances stated above to release it from the statutory liability if the very same establishment and its employees make a subsequent request for that purpose. The Act itself is meant to provide for the institution of provident fund for employees in factories and other establishments. This is one of those beneficial pieces of legislation intended to protect the interests of employees more, rather than those of the employer. The jurisdiction which the statutory authority gets automatically under the Act is in relation to an establishment which is a factory engaged in any industry specified in schedule I to the Act and in which twenty or more persons are employed and also to any other establishment employing twenty or more persons, etc. Admittedly, the petitioner-company at no time had twenty or more persons on its rolls, and as such the respondent has no jurisdiction to call upon the petitioner-company to contribute under the normal provisions of the Act. But in the instant case, the establishment itself approached the authority to include it, on the list of contributories, and in that behalf, a request was made by the employer as well as the employees resulting in the application of the provisions of the Act to the petitioner-company which normally would be outside the purview and jurisdiction of the Act. The question is if such an establishment comes within the purview of the Act by a voluntary process of its own, can it or can it not go out of it once again on its own request. It is elementary that if a person or a body of persons can do an act for their benefit but contemporaneously burdened with obligations they would be in order at any time thereafter to seek for a relief of such obligations created by their voluntary act of commission by once again expressing in unequivocal terms their desire not to be burdened any more with such liabilities or obligations. This is reflected in Clause 21 of General Clauses Act. It therefore follows that notwithstanding the reconstitution of the firm from a proprietary one to a partnership one, the majority of the employees together with the employer can seek for a withdrawal of their original application which bound them under the provisions of the Employees' Provident Funds Act, 1952. This is what the petitioner did when it applied on 11th April, 1969 for such a relief. The petitioner is entitled to the relief and the respondent is bound to release the petitioner.

3. The question, however, is whether the application for withdrawal has been made by the employer and the majority

of the employees in relation to the establishment of the petitioner-company. The reconstituted firm has retained three out of the four employees besides the quondam proprietor of the firm. One of the employees, however, has become a partner; but he is still a serving member of the establishment. At the time when an application was made by the employees for joining the fund, the four employees and the proprietor were the joint applicants. At the time when they sought for a release from the obligation under the Act, the peon one Sudandiram, has not obviously signed, since it is reported that by then he had resigned. But under section 1 (4) of the Act, the application for joining should be made by the employer and a majority of the employees. Even so, it follows that a desire that the provisions of the Act need not be made applicable to the establishment may also by communicated by the employer and a majority of the employees therein. Here, the employer and the other employees of the company have made such a request on 11th April, 1969. I am of the view that the petitioner is entitled to the relief asked for, namely, for the issue of a writ in the nature of *certiorari*, since the order passed by the respondent is without jurisdiction and poses also an apparent error of law. The respondent is bound not only to entertain the application for withdrawal, but also accept the request for the non-application of the provisions of the Act to the petitioner-company, as the respondent has no jurisdiction otherwise as against the establishment under the provisions of the Act.

4. In the result, the Writ Petition is allowed and there will be no order as to costs.

P.S.P. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K.S. Venkataraman and S. Maharajan, JJ.*

B. Yegnanarayaniah .. *Appellant**

and

Alladi Subramanian .. *Applicant**

v.

B. Yegnanarayaniah and another .. *Respondents.*

Constitution of India (1950), *Article* 215—*Civil contempt—Inherent powers of High Court —Action* suo motu—*Scope—Proceedings for contempt —Quasi criminal.*

Per *Venkataraman, J.*—No limitation has been imposed in Article 215 of the Constitution that in cases of civil contempts the High Court cannot take action *suo motu*. It is easy to conceive of a case where no party may care to come forward to move the Court for initiating proceedings for contempt, but where the Court may consider it necessary and expedient to initiate action *suo motu*. It is obviously necessary in such cases that the Court should have such a power. [*Para.* 8.]

Proceedings for contempt are quasi-criminal in nature as pointed out by the Privy Council in *Ambard* v. *Attorney General for Trinidad and Tobago* (1936) A.C. 322 and 329. [*Para.* 14.]

Cases referred to :—

Sukhdev Singh Sodhi v. *The Chief Justice and Judges of the Pepsu High Court*, 1954 S.C.J. 67: (1954) 1 M.L.J. 137: 1954 S.C.R. 454: A.I.R. 1954 S.C. 186; In the matter of *Basantha Chandra Ghosh*, (1960) I.L.R. 39 Pat. 415: (1960) B.L.J.R. 622 : 61 Crl.L.J. 1234: A.I.R. 1960 Pat. 430; *R.L. Kapur* v. *State of Madras*, (1972) 1 S.C.W.R. 423: (1972) Crl.L.J. 643: (1972) 2 S.C.A. 90 ; A.I.R. 1972 S.C. 858: *Ali Mahomed Adamalli* v. *King Emperor*, I.L.R. (1945) Bom. 959: 72 I.A. 226: 48 Bom.L.R. 116: (1945) 2 M.L.J. 56:

* O.S.A. No. 20 of 1973 and C.M.P. No. 5109 of 1973.

9th August, 1973

A.I.R. 1945 P.C. 147; *Ambard* v. *Attorney-General for Trinidad and Tobago*, (1936) A.C. 322.

Appeal under section 19 (1) of the Contempt of Courts Act, 1971 against the order of the Honourable Mr. Justice Ramanujam, dated 16th March, 1973, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 184 of 1973 in C.S. No. 88 of 1970 and Petition praying that for the reasons stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioner to raise the following additional grounds in O.S.A. No. 20 of 1973 on the file of the High Court.

S. Balasubramaniam, for Appellant.

The Advocate-General, for Respondent.

The Judgment of the Court was delivered by

Venkataraman, J.—This is an appeal against the Judgment of Ramanujam, J., convicting the appellant, Yegnanarayaniah of contempt and sentencing him to undergo simple imprisonment for six months and a fine of Rs. 2,000.

2. The facts are these: One Subbamma created a trust called "Vavilla Venkateswara Sastrulu Trust" by deed dated 30th June, 1956. She was the sole trustee during her life and she appointed the appellant (her sister's son-in-law) as the sole trustee after her death. The appellant took charge as sole trustee on 12th September, 1958. She left a will in respect of her private properties and appointed the appellant as executor. On the allegation that the appellant did not perform any of the charities mentioned in the trust deed and misappropriated certain amounts, some persons filed a suit, C.S. No. 88 of 1970 seeking the removal of the appellant from the trusteeship. During the pendency of the suit, the appellant and an advocate Sri S.S. Marthandam, were appointed joint receivers. After an elaborate trial, Ramanujam, J., found that the appellant had diverted an amount of Rs. 1,22,769 from the trust fund to the executor's account without any authority or jurisdiction, in addition to the various enormous amounts misapprorpriated by him. He also found that he had lent a sum of Rs. 1,00,000 to his wife at a nominal interest at 7½ per cent. per annum in the year 1967. This amount was not really available for investment because necessary public dues like income-tax, wealth tax, estate duty etc., had not been paid. In effect he found that the appellant had wrongfully diverted the funds. When questioned about the loan in his evidence at the trial, the appellant stated that he had taken as collateral security by deposit of title deeds of the property of his wife, namely, Door No. 495, Tiruvottiyur High Road. Ramanujam, J., decreed the suit, directed the appellant to be removed from the trusteeship and ordered him to hand over the management of the properties of the trust to the Official Trustee, Madras. The appellant handed over some documents but not the documents relating to the deposit of title deeds by his wife in respect of Door No. 495, Tiruvottiyur High Road.

3. An application No. 184 of 1973, was made by the plaintiffs for directions to the appellant to produce the deeds. Ramanujam, J., by order dated 9th February, 1973, directed the appellant to produce the said deeds within a week. By his further order dated 11th February, 1973, he directed the appellant to be present in Court on the hearing date, namely 22nd February, 1973. The appellant did not appear on that date and did not produce the documents. Thereupon Ramanujam, J., by order dated 27th February, 1973 directed him to appear before the Court on 8th March, 1973 to show cause why he should not be proceeded with for committing contempt of Court in not complying with the orders of Court dated 9th February, 1973 and 17th February, 1973. This notice was accordingly served on the appellant on 7th March, 1973.

4. The appellant filed an affidavit in answer to this show cause notice. He stated therein that he was not in possession of title deeds relating to Door No. 495, Tiruvottiyur High Road, belonging to his wife. We are not concerned with the other title deeds. Ramanujam, J., however held by order dated 16th March, 1973, that it was a belated statement, that his conduct showed that he was in possession of the title deeds which he accepted as collateral security for the loan advanced

to his wife, that he wilfully suppressed them, that he was actuated by fraudulent motive in not bringing the documents because he had allowed the promissory note to become time-barred, and for enforcing the mortgage, for which a longer period of limitation was available the title deeds would be required and the appellant wanted to put obstacles in the way of the Official Trustee recovering the loan and that was why he did not produce the documents. The conduct of the appellant being highly reprehensible the learned Judge imposed the maximum punishment provided under section 12 in the Contempt of Courts Act (LXX of 1971).

5. The first point taken by Sri G. Vasantha Pai, the learned Counsel for the appellant, is that Ramanunajm, J, had no jurisdiction to initiate proceedings in contempt *suo motu*, that the order directing the appellant to produce the title deeds relating to Door No. 495, Tiruvottiyur High Road, for the disobedience of which the contempt proceedings were taken was an order which the Official Trustee or the plaintiffs in the suit could have enforced by initiating proceedings in execution of that order, that, at any rate, even if it amounted to wilful disobedience of the Court's order, it only amounted to "civil contempt" that the Court's jurisdiction under the Contempt of Courts Act to punish the appellant for civil contempt should have been invoked by the Official Trustee or by the plaintiffs, on an application in the manner provided in Order 19 of the Original Side Rules of this Court, 1956 and that the Court had no jurisdiction to take proceedings against the appellant *suo motu*.

6. On the merits he urged that the learned Judge was wrong in holding that the title deeds in question were with the appellant.

7. On the first point, the learned Advocate-General, Sri Govind Swaminathan supports the learned Counsel Sri Vasantha Pai. The submission of the learned Advocate-General (adopted and developed by Sri Vasantha Pai) is this. Under section 2 of the Contempt of Courts Act (LXX of 1971), 'contempt of Court' means civil contempt or criminal contempt. The contempt, if any, in this case would only constitute a civil contempt. 'Civil contempt' means wilful disobedience of any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court. Under section 14, when it appears to the Court that a person is guilty of contempt committed in its presence or hearing, then the Court may detain such person, inform him of the contempt with which he is charged, give him an opportunity to defend himself and then make an order for the punishment or discharge of such person. It is open to the party to ask for the trial of the case by some other judge. Under section 15, in the case of criminal contempts, other than contempts referred to in section 14, the High Court may take action on its own motion or on a motion made by the Advocate-General or any other person with the consent of the Advocate-General. Section 17 prescribes the procedure in respect of proceedings under section 15. Under this section notice should be served personally on the person charged and the notice should be accompanied by the copy of the motion and also copies of the affidavit, if any. Section 23 says that the Supreme Court or, as the case may be, any High Court may make rules not inconsistent with the provisions of this Act providing for any matter relating to its procedure. So far, our High Court has not framed any rules under Act LXX of 1971. Therefore the old rules continue. The old rules are to be found in Order 19 of the Orignal Side Rules and Appendix V of the Appellate Side Rules. These rules do not provide for *suo motu* action by the Court in a civil contempt for wilful disobedience of an order directing the party to produce some title deeds. In such matters an application is filed by the concerned party under Order 19 of the Original Side Rules or under the Appellate Side Rules. Sri Vasantha Pai, referring to Article 21 of the Constitution which says that no person shall be deprived of his life or personal liberty except according to procedure established by law, contends that no procedure has been established by law for the Court to take *suo motu* action in a case of civil contempt.

8. We are unable to accept these contentions. Article 215 of the Constitution says that every High Court shall be a

Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. This is only in recognition of the inherent powers of the High Court as a Court of record to punish for contempt of itself. No limitation has been imposed in this Article that in cases of civil contempts the Court cannot take action *suo motu*. It is easy to conceive of a case where no party may care to come forward to move the Court for initiating proceedings for contempt, but where the Court may consider it necessary and expedient to initiate action *suo motu*. It is obviously necessary in such cases that the Court should have such a power.

9. In *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*[1], the Supreme Court had to consider an application for transfer of certain contempt proceedings from the Pepsu High Court to any other High Court. In that connection, their Lordships pointed out that the High Court as a Court of record had from its inception the inherent power to punish for contempt. That was a special jurisdiction not in any way controlled by the Code of Criminal Procedure. This was recognised in section 2 of the Contempt of Courts Act, 1926. This position was maintained by the Constitution under Article 215. Section 2 of the Contempt of Courts Act, 1926 ran thus:

> "Subject to the provisions of sub-section (3), the High Court of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them *as they have and exercise in respect of contempts of themselves*".

It was recognized in Act XXXII of 1952. Their Lordships say that section 3 of the New Act (XXXII of 1952), is similar to section 2 of the old Act of 1926, and assumes the existence of a right to punish for contempt in every High Court and further assumes the existence of a special practice and procedure. Their Lordships then observed:

> "We hold therefore that the Code of Criminal Procedure, does not apply in matters of contempt triable by the High Court. The High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself.
>
> * * * * *
>
> If the Code of Criminal Procedure does not apply, then there is no other power which we can exercise. The Constitution gives every High Court the right and the power to punish a contempt of itself. If we were to order a transfer to another Court in this case we would be depriving the Pepsu High Court of the right which is so vested in it. We have no more power to do that than has a Legislature".

The discussion does not in any way turn on the question whether the contempt is a civil contempt or a criminal contempt.

10. A Division Bench of the Bombay High Court had to deal with the argument based on Article 21 of the Constitution in *State of Bombay* v. "*Mr. P.*"[1]. A Barrister, Mr. P. was the person against whom the proceedings were taken. His Counsel (Mr. K.L. Gauba) contended that there was no procedure relating to the exercise of the inherent jurisdiction of the Court in dealing with matters of contempt and that by virtue of Article 21 of the Constitution, the respondent there could not be deprived of his personal liberty. The learned Judges of the Bombay High Court met this argument by referring to the passage of the Supreme Court in *Sukhdev Singh Sodhi* v. *The Chief Justice and the Judges of the Pepsu High Court*[2], where their Lordships have observed that the High Court can deal with it summarily and adopt its own procedure and that section 3 of the Contempt of Courts Act, 1952, itself recognised the procedure existing previously, and the practice of the High Court, to punish for contempt of Court. The learned Judges, observed:

1. 1954 S.C.J. 67 : (1954) 1 M.L.J. 137 : 1954 S.C.R. 454 : A.I.R. 1954 S.C. 186.

1. 1958 Bom.L.R. 873 : A.I.R. 1959 Bom. 182.
2. 1954 S.C.J. 67 : (1954) 1 M.L.J. 137 : 1954 S.C.R. 454 : A.I.R. 1954 S.C. 186.

"Having regard to the provisions of the Act, we consider that the procedure followed by the High Court in dealing with matters relating to contempts of itself is a procedure established by law within the meaning of Article 21 of the Constitution".

The learned Judges also pointed out that clause 38 of the Letters Patent also led to the same result.

11. This decision was followed by a Full Bench of the Patna High Court in, In the ma ter of *Basantha Chandra Ghosh*[1], in paragraph 10 of the report.

12. In *R.L. Kapur* v. *State of Madras*[2], the Supreme Court had to consider the question whether the period of limitation of six years for collecting the fine laid down in section 70 of the Indian Penal Code applied to a case of recovery of fine imposed in earlier contempt proceedings. Their Lordships held that section 70 was no bar because the jurisdiction of the High Court in contempt proceedings was under special law not affected by the provisions of the Penal Code. Their Lordships followed the earlier case of the Supreme Court in *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*[3], and stated:

"In any case, so far as contempt of the High Court itself is concerned, as distinguished from that of a Court subordinate to it, the Constitution vests these rights in every High Court and so no act of Legislature could take away that jurisdiction and confer it afresh by virtue of its own authority."

Section 10 of the Act of 1971 maintains the same position. *Ali Mahomed Adamalli* v. *King Emperor*[4], is in a way useful to us because that is a case where the High Court *suo motu* initiated proceedings for civil contempt against the appellant for not complying with an order of the Court of Small Causes dated 4th September 1939, directing him to furnish some particulars under section 3 of the Wakf Act and he was found guilty and sentenced by the High Court. It was confirmed in appeal by the Privy Council. The point to be noted is that though other objections were put forth against the order finding him guilty of contempt, no objection was taken that the Court had no jurisdiction to initiate proceedings *suo motu.*

1. (1960) I.L.R. 39 Pat. 415: (1960) B.L.J.R. 622 : 61 Cr.L.J. 1234 : A.I.R. 1960 Pat. 430.
2. (1972) 1 S.C.W.R. 423 : 1972 Crl.L.J. 643 : (1972) 2 S.C.A. 90 : A.I.R. 1972 S.C. 858.
3. 1954 S.C.J. 67 : 1954 S.C.R. 454: (1954) 1 M.L.J. 137: A.I.R. 1944 I.C. 186.
4. I.L.R. (1945) Bom. 959 : 72 I.A. 226 : 48 Bom.L.R. 116 : (1945) 2 M.L.J. 56 : A.I.R. 1945 P.C. 147.

13. In view of these decisions and the statutory provisions, it is quite clear that this Court has jurisdiction to initiate contempt proceedings *suo motu* even in a civil contempt as defined in section 2 of Act LXX of 1971, that no particular form of procedure is necessary so long as the proceedings are initiated giving an opportunity to the contemner to defend himself and that Article 21 of the Constitution is not in any way violated thereby. We are also satisfied that the procedure adopted in this case was correct, that the appellant was made aware of the charge against him and that he was given a fair opportunity to defend himself. The order dated 9th February, 1973 itself gave full reasons which in the opinion of the learned Judge made him think that the title deeds were with the appellant. When he was asked to show cause why he should not be proceeded with for contempt, the appellant filed an affidavit, he was heard and only thereafter the order imposing the punishment was passed.

14. Before dealing with the merits, we must point out that proceedings for contempt are quasi criminal in nature as pointed out by the Privy Council in *Ambard* v. *Attorney-General for Trinidad and Tobago*[1], referred to by the Supreme Court in *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*[2], and that therefore we must be satisfied about the guilt of the appellant beyond reasonable doubt.

15. This brings us to the merits of the case. The question therefore to be considered is whether it had been proved beyond reasonable doubt that the appellant had the title deeds of his wife relating to the property, 495, Tiruvottiyur High Road. We are, however, not quite satisfied about it because, firstly, it is not quite

1. (1936) A. C. 322 and 329.
2. 1954 S.C.R. 454 and 460 : 1954 S.C.J. 67: 1954) 1 M.L.J. 137: A.I.R. 1954 S.C. 186.

clear that the wife had the title deeds herself and secondly, we cannot exclude the possibility of the appellant not having taken these title deeds at all as collateral security. The question of Sri P. Sivaramakrishniah, Counsel for the plaintiffs in C.S. No. 88 of 1970 at page 176 of the typed set, put to he appellant (D.W. 1) is this:

> "In Exhibit A-2, the settlement deed by Subbamma under which several properties were settled on persons including your wife the total value of the 5 properties settled was given as Rs. 70,000."

The answer is 'Yes'. In other words, the suggestion of the Counsel was, that the settlement deed related to several properties and, besides the wife of the appellant, there were several persons also on whom properties were settled. Hence we cannot be certain whether the settlement deed was with the wife of the appellant at all. Secondly, it is possible that in order to avoid an accusation that money was lent to his wife merely on a promissory note, the appellant thought it expedient to say at that stage of the evidence that the title deeds relating to D. No. 495, Tiruvottiyur High Road were taken as collateral security, without really having taken any collateral security. In this connection, it is not out of place to note that though in his earlier answer at page 175 of the typed set, the appellant had stated that on the security of all the title deeds relating to the house he gave the loan, in his further answer at page 176 of the typed set, he stated that at that time they were with one bank in connection with some other private transaction. This takes away the sting of the earlier admission and it would not be right for us to ignore this later statement, particularly when his earlier admission is the main basis for his being convicted of contempt. We were informed during the hearing of the appeal before us that the wife herself had denied that she deposited any title deeds with her husband; that is certainly not conclusive, but the question is one which will have to be tried in the normal way when a suit is filed against her by the Official Trustee to recover the loan. It may be that if the appellant did not take the title deeds as collateral security, he was guilty of dereliction of duty as a trustee. But the question before us in the contempt proceedings is different namely, whether it has been proved beyond reasonable doubt that the title deeds relating to Door No. 395, Tiruvottiyur High Road, were with him, having been handed over by his wife. It may be that he is really having the custody of the title deeds, but we cannot be certain about it. We are constrained to give the benefit of doubt, though we may add that we do so with great reluctance, because, otherwise the conduct of the appellant as trustee seems to be *prima facie* reprehensible.

16. Accordingly, we set aside the order finding him guilty of contempt of Court and the sentence of imprisonment for six months and fine of Rs. 2,000.

O.S.A. No. 20 of 1973.

Maharajan, J.—While agreeing with my learned brother, I wish to add a few remarks. The appellant has been held guilty of contempt of Court, because he failed to comply with the order of the learned Judge, Ramanujam, J., to produce the title deed in respect of Door No. 495, Tiruvottiyur High Road, belonging to his wife. The direction was made because in a prior deposition, the appellant, who had probably misappropriated Rupees one lakh out of the trust fund, trotted out the excuse that he had lent out the same to his wife, Bhuvanapalli Indiramma, on the security of an equitable mortgage accompanied by a deposit of her title deed relating to Door No. 495. It is conceded that in certain other proceedings initiated on behalf of the trust, the wife of the appellant has vehemently denied that she ever granted an equitable mortgage in favour of her husband or deposited her title deed with him. It is not, therefore, unlikely that the equitable mortgage referred to by the appellant was merely an invention intended to cover up an otherwise flagrant misappropriation of trust funds. Apart from the truth of the equitable mortgage, we shall investigate if the title deed in respect of Door No. 495, ever came into the custody of Bhuvanapalli Indiramma, or into the custody of the appellant subsequent to the date of the alleged equitable mortgage.

18. Door No. 495, originally belonged to one Vavilla Subbamma, the widow of Vavilla Venkateswara Sastrulu. By

document No. 1906 of 1956, dated 30th June, 1956, Vavilla Subbamma executed a deed of settlement whereby she settled all her properties including Door No. 495 upon as many as 11 settlees. Exhibit P-2 is a true copy of the deed of settlement. It shows that the total extent of the subject matter of the settlement was valued in the deed at Rs. 70,000, and the different items of properties described in Schedules A to K of the deed were settled upon different persons. Bhuvanapalli Indiramma, the appellant's wife, is described in the document as the tenth settlee, and Door No. 495, which has been described in Schedule H, has been settled upon her. It is further recited that the settlees 1 to 6 are the children of the settlor's sister-in-law, whereas settlees 8, 10 (Bhuvanapalli Indiramma) and 11 are the daughters of the settlor's sister. The 9th settlee is the settlor's sister's grand-daughter. The 7th settlee was given certain properties, because he was "the faithful and loyal servant of the late V. Venkateswara Sastrulu, husband of the Settlor, and served him for over 40 years without any blemish whatever and as dependant of the settlor and closely related to her as her aunt's son. There is no recital in the document to show to which out of the eleven settlees the original of the settlement deed was handed over. Nor is there any recital to show that eleven duplicates of the settlement deed were prepared and the duplicate handed over to each of the eleven settlees. It is, therefore, difficult to ascertain to whom the original of Exhibit P-2 was actually handed over. At the time of the settlement, the appellant's wife was about 29 years. The 11th settlee, who is the sister of the appellant's wife, was aged 30 years at that time. The elder sister of Bhuvanapalli Indiramma is more likely to have received the original of the settlement deed. The 5th settlee, Vedagiri Rama Sastri, is described as an Advocate, 55 years old and residing at Madras. He is the eldest of the eleven settlees and as an Advocate he must have realized the advantage of keeping custody of the original settlement deed, and might therefore have secured custody thereof. The subscription at the foot of the deed recites that the settlor affixed his signature and delivered the same in the presence of witnesses. The subscription leaves us wondering as to whom it was delivered. In these circumstances, there is a reasonable doubt as to whether the appellant's wife, who was only the tenth settlee in the deed, ever got into possession of the original title deed. If she did not get custody of the original of Exhibit P-2, she could not have deposited it with the appellant at the time of the alleged equitable mortgage, which, we have reasons to suspect, was itself a myth. The inability of the appellant to produce the title deed the custody of which he did not probably have is an element which has an important bearing on the question of his guilt. The conduct of the appellant is certainly such as to shock the conscience of any Court. He may be guilty of perjury or criminal misappropriation, with which we are not here concerned. If we give him the benefit of reasonable doubt in these quasi-criminal proceedings for contempt, we would have to hold that he is not proved to have been in custody of the title deed. If he is not in custody, his failure to produce the deed cannot be regarded as wilful, in which case it would follow that we must acquit him of contempt, which we do regretfully, I agree, therefore, that this appeal be allowed.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, J.*

T.U. Narayanan .. *Petitioner**

v.

K. Pachinayaki .. *Respondent.*

and

S.A. Subramania Iyer .. *Petitioner*

v.

K. Rathinam .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25—*Eviction—Revision—Effect of the Amendment Act of* 1973 —*Jurisdiction of District Judge—Retrospectivity—Should be express in the enactment.*

The Tamil Nadu Buildings (Lease and Rent Control) Amendment Act (XXIII of

*C.R.P. Nos. 1515 and 1516 of 1973. 28*th August,* 1973.

1973) does not touch upon the jurisdiction of the District Judge as revisional authority under section 25 of the Act (XVIII of 1960) in matters of which he is in seisin or relating to petitions filed b fore 30th June, 1973. Once a *lis* has been properly entertained by a statutory authority then it is that authority which ought to continue that proceeding, clear it and dispose of it unless expressly prohibited from doing so by a later enactment. [*Para.* 8.]

Retrospectivity should be clearly manifest in a legislative provision and such retrospectivity should not be given a larger effect than what is absolutely necessary. [*Para.* 10.]

Cases referred to—

Gnana Prakasam v. *Vsz*, 60 M.L.J. 293: A.I.R. 1931 Mad. 352; *State of Punjab* v. *Mehar. Singh Pratap Singh*, 1955 S.C.J. 25: (1955) 1 S.C.R. 893 : 56 Crl.L.J. 254 : A.I.R. 1955 S.C. 84; *Har Prasad Singh* v. *Ram Swarup*, A.I.R. 1973 All. 390.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Coimbatore (West) at Coimbatore dated 9th July, 1973 and made in C.R.P. Nos. 152 and 155 of 1972 respectively (R.C.A. Nos. 87 and 70 of 1970 on the file of the Court of the First Additional Subordinate Judge, Coimbatore and R.C.O.P. Nos. 251 and 253 of 1969 on the file of the Court of The Principal District Munsif and House Rent Controller, Coimbatore respectively).

M. N. Rangachari, S. Srinivasan, S. Sampathkumar, S. Raja Ram and *R. Subramaniam*, for Petitioners.

The Court made the following

JUDGMENT.—The tenants are the petitioners. The respondents filed applications seeking for the eviction of the petitioners as tenants under section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, 1960, hereinafter referred to as the Act, on the allegation that they required the premises for the purpose of demolition and reconstruction. The Rent Controller, the appellate-authority and the revisional authority came to the conclusion that the landlord's request under the circumstances as above was *bona fide*. Incidentally a contention was raised about the validity of the notice to quit and whether there was a proper undertaking as contemplated under section 14 (2) (*b*) of the Act. On this point raised, the tenants could not succeed both before the Rent Controller, the appellate authority and the revisional authority, namely, the District Judge who had the requisite jurisdiction to deal with such revision petitions under section 25 of the Act as it then was. It is as against the orders of the revisional authority that the present Civil Revision Petitions have been filed.

2. Again the contentions raised before the lower authorities were repeated. I am unable to interfere with the concurrent findings of the Courts below who accepted that the requirement of the landlords was *bona fide* and that they genuinely desire to demolish the building and reconstruct the same. On the question whether there was a valid notice to quit, the notices of termination of tenancy called upon the petitioners as tenants to hand over possession by the 1st July, 1969. The tenancy was in accordance with the English calendar month. Our Court accepted such a notice of termination of tenancy as a valid notice to quit and, in fact, the learned District Judge himself referred to the ruling of our Court in *Gnana Prakasam* v. *Vasz*[1]. In my view, the conclusion arrived at by the revisional authority that the notice to quit was proper, cannot be disturbed.

3. Regarding the other contention, the undertaking given by the respondents in accordance with section 14 (2) (*b*) of the Act ran in these terms:

> "The petitioner undertakes to start the work of demolition forthwith and complete the construction within 4 or 5 months".

The nature of the undertaking required in section 14 (2) (*b*) of the Act is that the landlord should undertake that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date he recovers possession of the entire building or before the expiry of such further period as the Controller may,

1. 60 M.L.J. 293: A.I.R. 1931 Mad. 352.

for reasons to be recorded in writing, allow. A proper understanding of this provision relating to the undertaking which a landlord should give if he seeks for eviction of the tenant for the immediate purpose of demolishing the building and erecting a new building on its site is that he should give a reasonable impression that he would take up the work of demolition of the building as expeditiously as possible but not later than one month from the date of recovery of possession of the building. In the instant case the petitioners undertook the work of demolition forthwith. The word 'forthwith' indicates that the demolition would certainly be started within a month from the date of obtaining possession. By necessary implication, the undertaking would come within the letter as well as the spirit contained in section 14 (2) (*b*) of the Act. The learned District Judge was therefore right in saying that there has been a substantial compliance of the requirement in section 14 (2) (*b*) and hence this point was also held against the petitioners. I am not inclined to interfere with it as I find no material irregularity or impropriety in the said finding. Ultimately the revisional authority dismissed the petitions. It is as against this order the present Civil Revision Petitions have been filed. Though in the grounds a reiteration is made of the contentions earlier raised, which, according to me, are concluded by findings which ought not to be disturbed, a question of general importance was argued by the learned Counsel for the petitioners, which I shall presently state and consider.

4. Act XVIII of 1960 provided for a revision to the District Judge of the district concerned against the order of an appellate authority passed under section 23 of the Act. In cases decided by an appellate authority under section 23 of the Act and functioning in the presidency town, the said decision is revisable by the High Court direct. The section also provides for the limits of interference. A revision could be entertained for the purpose by the High Court or the District Court, as the case may be, to satisfy itself as to the legality, regularity or propriety of such order and it may pass such order in reference thereto as it thinks fit. This was the old provision. Act XVIII of 1960 was further amended by the Tamil Nadu Buildings (Lease and Rent Control) Amendment Act, 1973 (XXIII of 1973), hereinafter referred to as the Amendment Act. We are however concerned with section 19 of the Amendment Act which runs as follows:

"19. *Substitution of section* 25, *Tamil Nadu Act XVIII of* 1960.

For section 25 of the principal Act, the following section shall be substituted, namely:—

25. *Revision.*—(1) The High Court may on the application of any person aggrieved by an order of the appellate authority, call for and examine the record of the appellate authority, to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the High Court that any such decision or order should be modified, annulled, reversed or remitted for re-consideration, it may pass orders accordingly.

(2) Every application to the High Court for the exercise of its power under sub-section (1) shall be preferred within one month from the date on which the order or proceeding to which the application relates is communicated to the applicant:

Provided that the High Court, may, in its discretion, allow further time not exceeding one month for the filing of any such application, if it is satisfied that the applicant had sufficient cause for not preferring the application within the time specified in this sub-section".

5. The main purport of this Act is to take away the revisional jurisdiction of the District Courts against an order of the appellate authority. In this Amendment Act no other saving provision is made regarding the disposal of proceedings which were by then pending in District Courts. There is however section 27 of the Amendment Act which expressly provides for the disposal of pending proceedings relating to fixation of fair rent.

6. Under these circumstances learned Counsel for the petitioners said that on and

after 30th June, 1973, when the Amendment Act came into force, there is automatic abatement of the revision petitions filed and pending disposal before the District Courts under section 25 of the Act and that therefore the order made by the learned District Judge in this case on 9th July, 1973 is without jurisdiction. It was also said that in the absence of a specific saving clause or an enabling provision in the Amendment Act to cover the transitory stage, the order of the District Judge should be deemed to be a nullity.

7. The situation now obtaining regarding similar matters could duly be conceived and stated as follows. There may be revision petitions filed under section 25 of the Act before the District Judge of each district which were duly entertained in accordance with the law then in force prior to 30th June, 1973. They were validly instituted and entertained. We can also conceive of cases where the District Judge as revisional authority has disposed of matters as such authority prior to 30th June, 1973 and the aggrieved party might have come to the High Court for the purpose of revision against the said order and such revision petitions may also be pending disposal by the High Court. If the appellate authority passes an order under section 23 of the Act on and after 30th June, 1973, then the aggrieved party should certainly seek relief in the High Court for purposes of revising such an order under section 19 of the Amendment Act. But the question is whether the quondam revisional authority, namely, the District Judge, under section 25 of the Act can deal with such a revision petition after 30th June, 1973 which was duly, regularly and properly entertained prior to that date. It was argued that the District Judge has no jurisdiction to deal with such revision petitions after 30th June, 1973.

8. I am unable to agree. The amendment Act of 1973 does not touch upon the jurisdiction of the District Judge as such revisional authority under section 25 of the Act in matters of which he is in seisin or relating to petitions filed before 30th June, 1973. Once a *lis* has been properly entertained by a statutory authority, then it is that authority which ought to continue that proceeding, clear it and dispose of it unless expressly prohibited from doing so by a later enactment. The Amendment Act has no retrospective effect. If the provisions of the Amendment Act of 1973 are only prospective in nature, then it is but regular to infer that the Legislature did not want to disturb the prior state of affairs and in particular did not want to take away the jurisdiction of the District Judge to deal with such revision petitions pending on his file on the 30th June, 1973. It is only in such circumstances that section 4 of the General Clauses Act, 1897 would come into play. Section 4 reads as under:

> "4. *Matters prior to repeal unaffected*—The repeal of any Act or Regulation shall not affect any act which shall have been done or any offence which shall have been committed, or any fine or penalty which shall have been committed, before the repealing Act shall have come into operation".

According to this section, if any proceeding has commenced before the repeal of section 25 of the Act, then it shall remain unaffected by the supervening provision in the enactment. When the Legislature has taken particular care to enact section 27 in the Amendment Act and made special provision for the disposal of pending proceedings relating to fixation of fair rent, by necessary implication it means that it did not want to disturb the pending proceedings in relation to other matters. By reason of the provision in the General Clauses Act, the continuity of the remedy or the legal proceedings already commenced is preserved and saved.

9. It is an accepted principle of law that when a repeal is followed by fresh legislation on the same subject, the later provision will prevail; but we have to look into the provisions of the new act only for the purpose of determining whether they indicate a different intention; see *State of Punjab* v. *Mehar Singh Pratap Singh*[1]. The bare repeal by itself does not give an indicia, but the manifest intention should be ascertained from the

1. 1955 S.C.J. 25: (1955) 1 S.C.R. 893: 56 Cr.L.J. 254 : A.I.R. 1955 S.C. 84.

new provision and if the Court is satisfied that a different remedy is provided for even as regards pending actions and if no other mode is possible then only the contention of the learned Counsel for the petitioners that there is total absence of jurisdiction on the part of the learned District Judge can be entertained. As the Supreme Court said in the above case:

> "The provisions of section 6 of the (Uttar Pradesh) General Clauses Act, 1904 (Corresponding to section 4 of the Madras General Clauses Act) will in our opinion, apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment".

10. Under the General Clauses Act, notwithstanding the repeal of section 25 of the Act and the introduction of section 19 in the Amendment Act, 1973, no contrary intention appears in the amended section providing for an automatic cessation of jurisdiction in the District Judge to deal with pending Civil Revision Petitions before him filed as against orders passed by the appellate authority prior to 1st July, 1973. It is also an accepted principle of law that retrospectivity should be clearly manifest in a legislative provision and such retrospectivity should not be given a larger effect than what is absolutely necessary. As was pointed out by a Full Bench of the Allahabad High Court in *Har Prasad Singh* v. *Ram Swarup*[1]:

> "The mere fact that the enactment in question does not contain any saving clause in not decisive of the question as to whether the Act is to operate retrospectively so as to affect pending cases as well."

11. A statutory remedy by way of an appeal or revision to a tribunal in the higher hierarchy does create a right in the litigant. If it can be safely assumed that the litigant had such a right to file a revision petition in the District Court, over orders passed by the appellate authority prior to 30th June, 1973 then it follows that the said revisional authority namely, the District Judge, is statutorily obliged to deal with such revision petitions unless there is a ban created in the exercise of such jurisdiction by him by a supervening legislative provision. I am of the view that the District Judge, when he disposed of the present matter, was a competent statutory tribunal who could exercise jurisdiction over a pending revision petition before him and the orders passed by him in that capacity are not assailable on the ground that there was total want of jurisdiction in him after the introduction of section 19 in the Amendment Act.

12. The practical difficulty in accepting the contention of the learned Counsel for the petitioners may also be pointed out. There are numerous Civil Revision Petitions now pending in the High Court against the orders of District Judges who disposed of old matters after the 30th June, 1973 as such revisional authorities. Is the High Court competent to revise or affirm such an order if the revisional authority lacked jurisdiction when it passed the said order? Or should the High Court treat it as a revision against the order of the appellate authority and deal with it? Or should the High Court return the said Civil Revision Petitions to the parties concerned to enable them, if they are so inclined, to file revision petitions under section 19 of the Amendment Act seeking a revision of the order of the Appellate Authority? The only possible reconciliation which could be had to surmount the above practical difficulties is to allow the continuance of pending proceedings before the District Judges of districts as revisional authorities under the quondam provision of law to exercise their jurisdiction under it and deal with them as there is no prohibition in the Amendment Act enabling them to do so. This would also simplify the complex practical problems which the High Court may be called upon to face. In all matters in which revisions have been filed to this Court against decisions of the District Judges as revisional authorities under section 25 of the old Act, the High Court can revise the same exercising jurisdiction under the quondam provision in section 25 of the Act.

1. A.I.R. 1973 All 390.

13. As the litigant's right to file a revision petition cannot so lightly be brushed aside unless the Legislature prescribed a mandate in that direction, I am of the view that the District Judges in the various districts would have jurisdiction to continue the pending Civil Revision Petitions before them provided they relate to orders passed by the appellate authorities before 30th June, 1973. The position, however, would certainly be different if an appellate authority has passed an order on and after 30th June, 1973 on which date section 19 of the Amendment Act came on the anvil. In those cases the District Judges certainly would not have jurisdiction to entertain the revision petitions and they would be right if they return the same for presentation to the proper Court. But in all other cases, particularly in cases where revisions are pending against the orders of the appellate authorities passed prior to 30th June, 1973, the District Judges will still have jurisdiction to deal with them and pass orders thereon. All such orders are once again revisable, if they need revision at all, by the High Court in exercise of its jurisdiction under the quondam section 25 of the Act. In these circumstances I am unable to agree with the learned Counsel for the petitioners that the order sought to be revised was passed by the learned District Judge without jurisdiction.

14. If the District Judge has such jurisdiction to continue those proceedings, hear them and dispose of them, he has no jurisdiction to return them. It is however made clear that this order of mine relates only to revision petitions pending before District Judges before 30th June, 1973, and as against orders of appellate authority passed before that date. The Civil Revision Petitions are therefore dismissed.

15. The petitioners seek for time to vacate on the ground that they were there for a considerable length of time. The petitioners are granted four months' time to vacate.

S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

S. S. Rajabathar .. *Appellant**

v.

N. A. Sayeed .. *Respondent.*

(A) *Civil Procedure Code* (*V of* 1908), *section* 47—*Executing Court—Powers of—Decree for specific performance of contract to sell immovable property—Absence of direction to deliver possession of property—Jurisdiction of executing Court to order delivery of possession—Relief of possession—Nature of—If incidental to and part and parcel of decree for specific performance—Specific Relief Act* (*I of* 1877)—*Suit for specific performance—Scope of.*

A direction to deliver possession of the property is incidental to a decree for specific performance of an agreement to sell immovable property, and, therefore, the executing Court has jurisdiction to order delivery of possession, although the decree in the suit for specific performance does not provide for delivery of possession. It cannot be said that in such a case the executing Court cannot go behind the decree and order delivery of possession.

The executing Court has jurisdiction to grant the relief of possession as incidental to the execution of the decree for specific performance of a contract of sale.

[*Para.* 22.]

(1915) I.L.R. 38 Mad. 698 : 1 L.W. 147 distinguished and explained : A.I.R. 1948 Nag. 406, dissented from.

Giving delivery of possession of property specifically directed to be sold is part and parcel of a decree for specific performance of an agreement to sell the property.

[*Paras.* 8 *and* 10.]

(1924) I.L.R. 47 Mad. 150 : 45 M.L.J. 431, relied on ; A.I.R. 1950 All. 415; A.I.R. 1954 All. 643; A.I.R. 1952 Cal. 362; A.I.R. 1955 Cal. 267; A.I.R. 1963 M.P. 86; A.I.R. 1920 Pat. 89; A.I.R. 1931 Pat. 179 and

* S.A. No. 1638 of 1970.

28*th September*, 1973.

A.I.R. 1957 Pat. 701, followed. (1895) I.L.R. 18 Mad. 415, : 5 M.L.J. 164, referred to.

(B) *Transfer of Property Act (IV of 1882), section 52—Applicability—Purchase of property pending suit by vendee under prior agreement for sale for specific performance of agreement —Sale by such purchaser to another and sale by the latter to another after decree in appeal in the suit—If hit by* lis pendens—*Plea of absence of knowledge of prior agreement for sale —Sustainability.*

The respondent in the Second Appeal entered into an agreement with *N* dated 4th September, 1958 for purchase of the suit property. As *N* failed to execute the sale deed, the respondent filed a suit against *N* for specific performance of the agreement in 1959 which was dismissed by the trial Court on 25th March, 1960. On appeal by the respondent, the appellate Court reversed the dismissal and decreed the suit by its decree dated 8th December, 1960. The judgment-debtor appealed to the High Court which was dismissed. During the interval *N* sold the property to *S* on 24th September, 1959 and from *S* the appellant in the second appeal purchased the property under a sale deed dated 4th August, 1961. When the respondent took proceedings in execution taken out by him for possession of the property under the decree for specific performance, the appellant brought a suit for a declaration of his title and for an injunction to restrain the respondent from seeking to dispossess him, pleading *inter alia* that he purchased the property from *S*, without knowledge of the respondent's suit for specific performance and that therefore he had a valid title to the property and was entitled to remain in possession.

Held : There was no dispute that the purchase by *S*, first, and, thereafter, by the appellant from *S* were affected by the doctrine of *lis pendens* and consequently as the suit of the respondent was ultimately decreed the appellant could not and did not acquire any title to the suit property. [*Para.* 2.]

Cases referred to :—

Krishnammal and another v. *M. Soundararaja Aiyar*, (1915) I.L.R. 38 Mad. 698. 1 L.W. 147 ; *Venkoba* v. *Subbanna*, (1888) I.L.R. 11 Mad. 151 ; *Brijmohan Mattulal* v. *Mt. Chandrabhagabai*, A.I.R. 1948 Nag. 406 ; *Krishnaswami and another* v. *Sundarappayyar*, (1895) I.L.R. 18 Mad. 415: 5 M.L.J. 164; *Sundara Ramanujam Naidu* v. *Sivalingm Pillai and another*, (1924) I.L.R. 47: Mad. 150 : A.I.R. 1924 Mad. 360 : 45 M.L.J. 431 ; *Muhiuddin Ahmed Khan* v. *Majlis Rai*, (1884) I.L.R. 6 All. 231; *Deonandan Prasad Singh* v. *Janaki Singh and others*, A.I.R. 1920 Pat. 89 ; *Atal Behary Acharya* v. *Barada Prasad Banerji*, A.I.R.. 1931 Pat. 179 ; *Sri Janardan Kisshore Lal Singh Deo and another* v. *Girdhari Lal Sunda*, A.I.R. 1957 Pat. 701 ; *Arjun Singh* v. *Sahu Maharaj Narain*, A.I.R. 1950 All. 415 ; *Pt. Balmukand* v. *Veer Chand*, A.I.R. 1954 All. 643 ; *Kartik Chandra Pal* v. *Dibakar Bhattacharjee*, A.I.R. 1952 Cal. 362 ; *Subodh Kumar Banerjee* v. *Hiramoni Dasi and others*, A.I.R. 1955 Cal. 267 ; *Dadulal Hanumanlala* v. *Smt. Deo Kumar Bai, w/o Shantilal Durg*, A.I.R. 1963 M.P. 86.

Appeal against the Decree of the Court of the Subordinate Judge, Kancheepuram dated 12th December, 1968 and passed in A. S. No. 222 of 1969 preferred against the Decree of the Court of the District Munsif, Kancheepuram in O. S. No. 767 of 1967.

R. Mohan, for Appellant.

M. A. Sathar Sayeed and *S. I. Samiullah*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O. S. No. 767 of 1967 on the file of the Court of the District Munsif of Kancheepuram who lost before the Courts below, is the appellant herein. The facts are not in controversy. The respondent herein entered into an agreement with one Namperumal Naidu under Exhibit B-1 dated 4th September, 1958 for purchase of the suit property. Namperumal Naidu having failed to execute the sale deed, the respondent instituted O. S. No. 41 of 1959 on the file of the Court of the District Munsif of Poonamallee against the said Namperumal Naidu for specific performance of Exhibit B-1 agreement. The said suit was dismissed by the learned District Munsif as evidenced by Exhibit A-8 dated

25th March, 1960 being a certified copy of the decree therein. The respondent took up the matter in appeal to the learned District Judge of Chingleput and the learned District Judge by his judgment and decree dated 8th December, 1960 reversed the conclusion of the learned District Munsif and decreed the suit for specific performance instituted by the respondent. Exhibit A-9 is a certified copy of the decree, while Exhibit B-2 is a certified copy of the judgment. The matter was taken up further in appeal to this Court by the judgment-debtor and that appeal was dismissed. During the interval, Namperumal Naidu sold the suit property to one Santhiappa Naicker on 24th September, 1959 and from the said Santhiappa Naicker, the appellant herein purchased the property under Exhibit A-1 dated 4th August, 1961. From this it is clear that on the date when Namperumal Naidu sold the property to Santhiappa Naicker on 24th September, 1959, O. S. No. 41 of 1959 was pending and subsequently when the appellant purchased the property from the said Santhiappa Naicker on 4th August, 1961, A.S. No. 153 of 1960 had already been disposed of in favour of the respondent herein. It was thereafter that the respondent herein took proceedings for execution of the decree passed in his favour in A.S. No. 153 of 1960 and by way of execution he prayed for an order for delivery of possession. Such delivery of possession was ordered by the executing Court in favour of the respondent and the respondent proceeded to take possession of the property pursuant to the orders of the Court. It is at that stage that the appellant herein instituted the present suit for a declaration of his title to the suit property and for an injunction restraining the respondent herein from seeking to dispossess the appellant on the basis of the orders passed by the executing Court in execution of the decree passed in A.S. No. 153 of 1960. The case of the appellant was that he had purchased the suit property from Santhiappa Naicker without knowledge of the suit for specific performance, that consequently he had acquired a valid title to the property and that therefore he was entitled to remain in possession of the same. He also put forward a contenion that the executing Court had no jurisdiction to order delivery of possession in execution of the decree in A.S. No. 153 of 1960 since the decree therein did not contain a clause regarding delivery of possession. The Courts below held that since Santhiappa Naicker purchased the property during the pendency of the suit instituted by the respondent herein which ultimately ended in his favour, the said sale was affected by the doctrine of *lis pendens* and that consequently Santhiappa Naicker did not acquire title to the property with the result the appellant himself did not acquire title to the property from Santhiappa Naicker. With regard to the contention of the appellant that the executing Court had no jurisdiction to direct delivery of possession, since the decree in the suit for specific performance instituted by the respondent did not provide for delivery of possession, the Courts below overruled the same on the ground that the direction to deliver possession of the property is incidental to a decree for specific performance and therefore the executing Court had jurisdiction to order delivery of possession. It is against those judgments and decrees that the present second appeal has been preferred by the plaintiff in the suit.

2. Having regard to the admitted fact that Santhiappa Naicker purchased the property from Namperumal Naidu during the pendency of the suit instituted by the respondent herein for specific performance of the agreement, there can be no dispute whatever that the purchase by Santhiappa Naicker first and thereafter by the appellant were affected by the doctrine of *lis pendens* and consequently as the suit instituted by the respondent was ultimately decreed, the appellant had not acquired any title to the suit property, with the result the only question that arises for consideration is, whether the appellant is entitled to any injunction restraining the respondent from seeking to take possession of the property pursuant to the orders of the Court in execution of the decree in A. S. No. 153 of 1960.

3. Mr. R. Mohan, learned Counsel for the appellant, placed reliance on a decision of this Court as well as that of the Nagpur High Court in support of his

contention that in so far the decree passed in favour of the respondent in A.S. No. 153 of 1960 did not provide for delivery of possession, the execution Court could not go behind that decree and order delivery of possession. The decision of this Court relied on is that of Sankaran Nair and Tyabji, JJ. in *Krishnammal and another* v. *M. Soundararaja Aiyar*[1]. In that case the plaintiff had earlier instituted a suit for specific performance and obtained a decree for specific performance and a sale deed was executed in his favour. Thereafter, he filed an independent suit for recovery of possession. The question for consideration before the Bench was whether the subsequent suit for recovery of possession was barred under Order 2, rule 2 of the Code of Civil Procedure. The learned Judges who decided the case held that such a suit was not barred by Order 2, rule 2 of the Code of Civil Procedure. Sankaran Nair, J. held that at the time when the plaintiff brought that suit for specific performance, the right to possession was not vested in him ; that he would acquire that right only on the execution of the deed of conveyance ; and that possession was not merely an incident or subsidiary to the sale deed. The learned Judge also pointed out that in a suit for specific performance the parties to the contract alone need be parties.

4. On the other hand, Tyabji, J., pointed out :

> " Assuming (as was argued before us) that the agreement gave the right of possession apart from the right to obtain a conveyance, still possession under the agreement could only be for the period prior to the conveyance, after which the purchaser's title would be completed and he would then be entitled to possession not under the agreement, but on the basis of his title. The plaintiff's failure to ask for possession in the previous suit might therefore have been fatal to any claim he might have set up in the present case under the agreement. If for instance the plaintiff had alleged that he was entitled to possession under the agreement at some time previous to the conveyance, and had claimed in the present suit damages for being kept out of possession from that date, the answer might no doubt have been that the plaintiff's rights to such damages until the date of the conveyance were barred : *Venkoba* v. *Subbanna*[1]. The plaintiff makes no such claim. His claim is on a distinct cause of action which had not arisen at the time when the first suit was instituted."

5. Thus, it will be seen that the learned Judges were not considering the question as to the jurisdiction of the executing Court with reference to a decree for specific performance, but they were considering the question whether the cause of action for the claim of the plaintiff in the latter suit was based upon the original agreement or the subsequent conveyance deed executed in his favour.

6. The decision of the Nagpur High Court referred to and relied on by the learned Counsel is that of a single Judge of that Court in *Brijmohan Mattulal* v. *Mt. Chandrabhagabai*[2]. In that case, the learned Judge of that Court took the view that the executing Court's jurisdiction is limited to the decree itself and that if a decree in respect of a particular property or in respect of a particular matter was rightly or wrongly not passed, it could not be executed in respect of that property or in respect of that matter. While coming to this conclusion, the learned Judge referred to the decision of this Court referred to already, among others, and held that this Court had taken the view that the two reliefs were distinct. In my opinion, the judgment of this Court in *Krishnammal and another* v. *M. Soundararaja Aiyar*[3], referred to already is no authority for the proposition that where a suit for specific performance has been decreed, the executing Court in execution of that decree has no right to pass orders with regard to incidental matters such as delivery of possession, in a case where the suit for specific performance was for the enforcement of an agreement to lease or an agreement to sell an immovable property. In view of the preponderant view of the other Courts to which I shall make a reference im-

1. (1915) I.L.R. 38 Mad. 698 : 1 L.W. 147.

1. (1888) I.L.R. 11 Mad. 151.
2. A.I.R. 1948 Nag. 406.
3. (1915) I.L.R. 38 Mad. 698: 1 L.W. 147

mediately, I am unable to agree with the conclusion of the learned single Judge of the Nagpur High Court in the case referred to already.

7. Before referring to the decisions of the other Courts, on the point, it will be useful to refer to two decisions of this Court, though not on the identical point, but having a bearing on the question under consideration. In *Krishnaswami and another* v. *Sundarappayyar*[1], a Bench of this Court (Muthusami Ayyar and Best, JJ.) pointed out that " the cause of action, namely, the right to obtain a sale deed and possession of the property purchased, concerns both the defendants and entitles plaintiff to relief against both." That again was not a decision dealing with the jurisdiction of the executing Court.

8. Another Bench of this Court had to consider the question of Court-fee payable on a suit for specific performance which also incidentally prayed for recovery of possession in *Sundara Ramanujam Naidu* v. *Sivalingam Pillai and another*[2]. Krishnan, J., in that case held :

> " The relief by way of giving possession arises from the relief granting the execution and delivery of the sale deed, as without a registered sale-deed, title cannot be transferred under the Transfer of Property Act where the value is over Rs. 100 ; without the latter relief being granted, the former cannot : see *Muhiuddin Ahmed Khan* v. *Majlis Rai*[3]. Nevetheless both the rights, *viz*., the first to the sale-deed and the right to possession spring out of the same contract though one necessarily precedes the other. The delivery of possession is a part of the specific performance of a contract of sale unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possesion is as much a part of specific performance as the claim for the payment of the price is, when the seller brings the suit for specific performance". (Italics are mine)

1. (1895) I.L.R. 18 Mad. 415 : 5 M.L.J. 164.
2. (1924) I.L.R. 47 Mad. 150 : 45 M.L.J. 431 : A.I.R. 1924 Mad. 360.
3. (1884) I.L.R. 6 All. 231.

9. Venkatasubba Rao, J., who constituted the other member of the Bench observed :

> " Specific performance does not consist merely of the execution of a sale-deed. A suit to obtain a sale-deed is not what is referred to in the said section, but it is a suit for specific performance of a contract of sale. The execution of a conveyance is only a part of the specific performance. If the vendor agrees to execute a conveyance as well as to deliver possession, it cannot be said that specific performance of the contract does not comprise both the execution of the sale-deed and delivery of possession. In every contract of sale, unless the contrary appears the vendor must be deemed to impliedly agree to give possession of the property to the purchaser. In a suit for specific performance the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour. "

10. Even though the above decision also did not deal with the jurisdiction of the executing Court after a decree for specific performance has been passed, still the statement of the learned Judges which I have shown in italics will clearly show that giving possession of property specifically directed to be sold is part and parcel of a decree for specific performance of an agreement to sell the property.

11. As I have pointed out already, there are several decisions of other Courts of this country directly supporting the conclusion of the Courts below on the point in question.

12. The earliest of the decisions is that of a Bench of the Patna High Court in *Deonandan Prasad Singh* v. *Janaki Singh and others*[1]. In that case, the Bench held that where the right to possession sprang out of the contract for sale, delivery of possession would be included in the relief by specific performance and generally the right arose co-incidentally with the right to the execution of the conveyance. In so holding, the Bench pointed out that if this Court in *Krishnammal and another* v.

1. A.I.R. 1920 Pat. 69.

M. Soundararaja Aiyar[1], did intend to lay down a contrary view, the Patna High Court would respectfully venture to differ.

The next decision is that of the same High Court in *Atal Behari Acharya* v. *Barada Prasad Banerji*[2], In that case the question actually arose with regard to the jurisdiction of the executing Court with reference to a decree for specific performance of a contract of sale. The learned Judges have held that incidental to the relief to which a plaintiff is entitled in a decree for specific performance arising on a contract for sale, the Court has a right to grant possession of the property; that a contract for sale includes not only the execution of the necessary document but also putting the vendee in possession of the property; and that therefore if there is an omission in the plaint or in the decree about possession, the executing Court is not debarred from granting the plaintiff the possession of the property. Unfortunately, while coming to this conclusion, the learned Judges mistook the decision of this Court in *Krishnammal and another* v. *M. Soundararaja Aiyar*[1]. I have already referred to the fact that that decision was concerned only with the bar imposed by Order 2, rule 2, Code of Civil Procedure and was not concerned with the jurisdiction of the executing Court. Erroneously thinking that that Judgment denied the jurisdiction to the executing Court to grant relief of possession; the learned Judges of the Patna High Court stated that in so far as that decision held that the executing Court had no right to deliver possession to a decree-holder in an action for specific performance, that proposition had been expressly dissented from by the Patna High Court in *Deonandan Prasad Singh* v. *Janaki Singh and others*[3], referred to already. Thus, it will be seen that both the Benches of the Patna High Court in the two decisions referred to above would appear to have mistaken the scope of the decision of this Court in *Krishnammal and another* v. *Soundararaja Aiyar*[1]. Notwithstanding this mistake with regard to the scope of the decision of this Court, the learned Judges of the Patna High Court, if I may say so with respect, came to the correct conclusion that an executing Court had jurisdiction to grant or order delivery of possession in execution of a decree for specific performance. One of the reasons given by the learned Judges is that under section 55 of the Transfer of Property Act, one of the implied conditions of a contract for sale of immovable property is to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits. Consequently, when the executing Court directs delivery of possession after a conveyance has been executed, it is merely completing the decree for specific performance by directing the vendor to perform one of the obligations which he has undertaken to perform and which law imposes on him.

1. (1915) I.L.R. 38 Mad. 698 : 1 L.W. 147.
2. A.I.R. 1931 Pat. 179.
3. A.I.R. 1920 Pat. 89.

13. Mohamed Noor, J., in the above decision (*Atal Behary Acharya* v. *Barada Prasad Banerji*[1]) observed:

> "There is no doubt that the plaintiff's suit was for specific performance of a contract of sale. It would have been quite enough for him if he would have simply prayed that the defendant be directed to specifically perform the contract for sale. If that relief was granted by the decree everything which was necessary for the contract to be specifically performed could have been ordered and enforced in the execution.

14. The above decision was followed by another Bench of the Patna High Court in *Sri Sri Janardan Kishore Lal Singh Deo and another* v. *Girdhari Lal Sunda*[2].

15. Thus, the view of the Patna High Court has been uniformly to the effect that an executing Court has jurisdiction to order delivery of possession, while executing a decree for specific performance of an agreement either to sell an immovable property or to lease an immovable property.

16. The same view has also been taken uniformly by the Allahabad High Court. A Bench of that High Court in *Arjun Singh* v. *Sahu Maharaj Narain*[3], took the view that where in a suit for specific performance of a contract of sale no relief for possession is claimed and consequent-

1. A.I.R. 1931 Pat. 179.
2. A.I.R. 1957 Pat. 701.
3. A.I.R. 1950 All. 415.

ly the decree passed in the suit contains no relief for delivery of possession, the Court executing the decree is competent to deliver possession, an order directing delivery of possession being merely incidental to the execution of the deed of sale. This Bench, with reference to an argument advanced on behalf of the judgment-debtor, based on the decision of this Court in *Krishnammal and anther* v. *M. Soundararaja Aiyar*[1], very rightly pointed out that in that decision the Court was not concerned with the question of the power of the executing Court to direct delivery of possession of property in executing a decree for specific performance of sale of that property. The learned Judges held:

> "What we have to consider is whether it is within the competence of the execution Court not only to execute the deed of sale, but also to deliver possession of the property, in pursuance of the decree for specific performance of a contract for sale. There can be no doubt that if a person sues another for specific performance of an agreement to sell, and subsequently *on the basis of the same agreement*, sues for possession, the second suit would be barred by Order 2, rule 2, but if the subsequent suit is based on the cause of action flowing from the *conveyance* obtained in pursuance of the decree in the first suit, it will not be barred by Order 2, rule 2, as the cause of action for the second suit is quite distinct.
>
> Order 21, rule 32 (5), Civil Procedure Code, clearly provides that in case a decree for the specific performance of a contract for sale is not obeyed, the Court may direct that the act required to be done under the decree may be done, so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor. The nature of the relief granted by the decree in a suit for specific performance of a contract for sale is such that everything which is necessary for the contract to be specifically performed should be held to be comprised in it. A contract for sale includes not only the execution of the sale deed as required by the Transfer of Property Act, but also putting the vendee in possession of the property sold. As soon as the deed of conveyance is executed, the title to the property in question vests in the vendee. The delivery of possession by the execution Court, therefore, appears to be something incidental to the right of the decree-holder to have the contract specifically performed. The deed of conveyance is itself executed by the execution Court. An order directing delivery of possession to the vendee is merely incidental to the execution of the deed of sale."

17. The same view was reiterated by another Bench of that Court in *Pt. Balmukand* v. *Veer Chand*[1]. In that case, the Bench went a step further and held that where a decree for specific performance of a contract of sale is silent as to the relief of delivery of possession , even though claimed in the suit, the executing Court is still competent to deliver possession. The learned Judges have pointed out that it is not necessary in suit for specific performance either to separately claim possession or for the Court to pass a decree for possession and that a decree for specific performance of a contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by section 55 of the Transfer of Property Act. According to the learned Judges :

> "The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the Court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of section 55 (1)(*f*), Transfer of Property Act. Delivery of possession is a necessary ingredient and part of transfer of ownership."

18. The same is the view of the Calcutta High Court also. In *Kartik Chandra Pal* v. *Dibakar Bhattacharjee*[2], a Bench of that High Court held :

> "It is incontestable that in a suit for specific performance of contract for the

1. (1915) I.L.R. 38 Mad. 698 : 1 L.W. 147.

1. A.I.R. 1954 All. 643.
2. A.I.R. 1952 Cal. 362.

sale of land it is open to the plaintiff to join in the same suit two prayers one for the execution of the deed of transfer and another for recovery of possession of the land in question...The right to recover possession springs out of the contract which is being specifically enforced and not in the narrower view expressed in some of the cases that it was only as a result of the execution and completion of the conveyance that such a right arises..........

....The usual form of a decree in a suit for specific performance is that the agreement is referred to be specifically performed and carried into execution with a further provision about the details of the steps to be taken by the parties. The most important part of the decree is that portion where the Court directs the contract to be specifically performed. The details which follow do not in any way limit the jurisdiction of the executing Court to the particular steps which are mentioned in the decree but all such other steps which ought to be taken for giving full effect to the decree for specific performance are not only within the competence of the Court but the Court is bound to assist the party to that extent............By the decree for specific performance the Court sets out what it finds to be the real contract between the parties and declares that such a contract exists and it is for the executing Court to do the rest."

19. The same view was reiterated by another Bench of that Court in *Subodh Kumar Banerjee* v. *Hiramoni Dasi and others*[1]. The learned Judges held :

"Thus unless there is a contract to the contrary, giving delivery of possession to the buyer by the seller is an incident of a contract for sale and when there is a decree directing the contract to be specifically performed it includes a direction upon the vendor to give delivery of possession to the purchasers."

20. The same view was taken by the High Court of Madhya Pradesh in *Dadulal Hanumanlala* v. *Smt. Deo Kunwar Bai* w/o *Shantilal, Durg*[2]. The learned Judge held in that case :

"Under section 55 of the Transfer of Property Act the rights and liabilities of buyer and seller, in the absence of a contract to the contrary, have been enumerated and, as the contract in question (Exhibit P-1) is silent and there being nothing to the contrary as to the delivery of possession, it has to be held that the vendor-defendant had contracted with the plaintiff vendee to deliver possession to him over the property after execution of the sale-deed in his favour. It was a part of the entire contract and had come into existence simultaneously with that part under which the sale-deed was to be executed. The result, therefore, was that when the plaintiff went to the Court claiming specific performance of the contract (Exhibit P-1) and was declared to be so entitled, the defendant-judgment-debtors would be deemed to have been held also correspondingly liable not only to convey the property but also to place the plaintiff-decree-holder in possession thereof on being so required by him."

21. The learned Judge has further pointed out that when the judgment-debtor refuses to execute the conveyance and the Court executes the conveyance, the Court is substituted for the judgment-debtor and by virtue of that substitution, the Court is entitled to direct the judgment-debtor to put the decree-holder in possession of the property. The learned Judge went on to state :

"Since under the Transfer of Property Act the right to ask for possession and right to obtain the same is implicit in the contract to transfer the property, then the decree-holder automatically gets that right to demand possession from the party conveying the property and that party in such a situation being only the Court, which had replaced the judgment-debtor and which had to act, therefore, on his behalf as his statutory agent, it necessarily became liable to perform that part of the contract relating to delivery of possession also. What the Court did was nothing but obeying the decree recognizing the contract including performance of such further acts and things as would be found requisite to give full effect to the same.

1. A.I.R. 1955 Cal. 267.
2. A.I.R. 1963 M.P. 86.

22. No other decision of any other Court bearing on this point was brought to my notice. As I have pointed out already, there is no decision of this Court holding that where a suit for specific performance of a contract for sale has been decreed by a Court, the executing Court, while executing the decree, has no jurisdiction to direct delivery of possession asincidental to the execution of the conveyance in favour of the decree-holder.On the other hand, as I have pointed out already, excepting the Nagpur High Court, in the solitary decision referred to above, all the other High Courts have taken the view that the executing Court has jurisdiction to grant the relief of possession as incidental to the execution of the decree for specific performance of a contract for sale, and I prefer to follow these decisions.

23. Under these circumstances, I am clearly of the opinion that the conclusion of the Courts below is correct and the Second Appeal fails and is dismissed. There will be no order as to costs. No leave.

P.R.N. *Second appeal dismissed. Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*K. Veeraswami C. J. and V.V. Raghavan, J.*

S. Kannan and others .. *Appellants**

v.

The All India Sai Samaj (Registered) by its President, D. Bhima Rao, Mylapore .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 6 (18) *and* (20)—" *Temple* "—*Sai Mandir at Mylapore—If a* ' *temple* '.

'Temple' is defined in section 6 (20) of the Madras Hindu Religious and Charitable Endowments Act as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community. [*Para.* 18.]

'Sai Mandir' situate at Mylapore is not a place of public religious worship dedicated solely to the members of the Hindu community. Hence it is not a temple as defined in section 6 (20) of the Act. [*Para.* 19].

Cases referred to :

State of Madras v. *Seshachalam Chettiar Charities*, (1960) 2 M.L.J. 591 : (1960) L.W. 794 ; *Sri Ramanasramam* v. *Commissioner, Hindu Religious and Charitable Endowments, Madras*, (1960) 2 M.L.J. 121 : I.L.R. (1960) Mad. 922 : A.I.R. 1961 Mad. 265 ; *The Urumu Seshachalam Chettiar Charities, Tiruchirapalli by its Board of Trustees* v. *The State of Madras and others*, W.P. No. 1034 of 1957 (Unreported) ; *Shanmugha Perayyar* v. *State of Madras, represented by the Secretary, Home Department, Government of Madras*, (1965) 1 M.L.J. 311 : I.L.R. (1965) 2 Mad. 505 : A.I.R. 1965 Mad. 416 ; *T. R. K. Ramaswami Servai and another* v. *Board of Commissioners for the Hindu Religious Endowments, Madras, through its President*, (1950) 2 M.L.J. 511 : I.L.R. (1950) Mad. 799 ; A.I.R. 1951 Mad. 473.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Kailasam, dated 23rd June, 1967 and made in the exercise of the Special Original jurisdiction of the High Court in Writ Petition No. 4047 of 1965 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the first respondent dated 8th September, 1965 in O.A. No. 30 of 1965 and quash the order therein.

N. Panchapakesa Iyer, for Appellants 1 to 5.

The Government Pleader, for Appellant 6.

M. K. Nambiar, for *N. A. Subramaniam*, for Respondent.

The Judgment of the Court was delivered by

Raghavan, J.—The respondents in the writ petition are the appellants. The appeal arises out of an order of Kailasam, J, in W.P. No. 4047 of 1965 quashing the order of the Deputy Commissioner for Hindu Religious and Charitable Endowments (Administration) Department, Madras-34, holding that "Sri Sai Mandir"

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* W.A. No. 498 of 1967.

28th February, 1973.

situate at Mylapore is a 'temple' as defined in section 6 (20) of the Hindu Religious and Charitable Endowments Act, 1959, on the ground that there is no material before the Deputy Commissioner to come to the conclusion that " Sai Mandir " is a Hindu " Religious Institution " and that the order of the Deputy Commissioner is vitiated by material errors apparent on the face of the record. The present appeal is against the order of Kailasam, J.

2. The petitioner in the writ petition is the President of the All India Sai Samaj, which was founded in 1941 and was registered in 1956 under the Societies Registration Act, 1865. The objects of the Samaj are the propagation of faith in God with special reference to Sai Baba of Shirdi and his life, teachings, and mission , the diffusion of knowledge regarding Sai Baba, the arrangement of lectures, the carrying on of Bajanas and Harathis for Sai Baba and the construction of buildings for carrying out the aforesaid objects. The Memorandum of Association of the Samaj shows that the Samaj is a voluntary association of persons, membership to which is open to adults belonging to all religions who believe in the worship of Sai Baba of Shirdi. In the Sai Mandir there is no image but worship is carried on to the Sai Baba's picture. Rule 20 of the Memorandum of Association prohibits the admission of any image for Sri Sai Baba or of any one else into the Mandir. The membership of the Samaj is open as already stated to Hindus, Christians, Parsis and Muslims, who are Sai devotees. The Samaj owes its origin to the propagation of ' Sri Sai Bakthi' undertaken by one Sri Narasimhaswami who came to Madras in 1940 and who founded the All India Sai Samaj in 1941. A site in Mylapore, Madras was purchased in the name of the Samaj and the present *sanctum sanctorum* was constructed in 1952. In addition to this Sai Mandir, separate buildings for the free dispensary, reading room and library, book depot and the room where he printing press of the Samaj is situate, were also constructed and the Sai Mandir was consecrated according to the respondents in 1953. In the *sanctum sanctorum* is kept a picture of Sri Sai Baba of Shirdi and underneath the picture are embedded two stone feet ('Padas'), of Sri Sai Baba. Daily Pooja, Archana and Harathi are performed with the recital of Sri Sai Ashtothara Namavalies composed in praise of Sri Sai Baba. Sai Devotees drawn from all religions, castes, creed and communities visit and worship in the Sai Mandir. The affairs of the Samaj, as already stated, are vested in the Executive Committee of the Samaj. The temple and its properties were made over to the Sai Samaj by Sri Narasimhaswamiji prior to his death in 1956 and the Samaj has been administering the affairs ever since.

3. In August, 1964, respondents 2 to 6, who were members of the Samaj filed an application O.A. No. 86 of 1964 before the first respondent under section 64 of the Hindu Religious and Charitable Endowments Act (Madras Act XXII of 1959) for framing a scheme for the management of "Sai Baba temple situate in Alamelumangapuram Street, Mylapore, Madras-4", alleging various acts of mismanagement and other acts of omission and commission on the part of the management. The All India Sai Samaj by its President, D. Bhima Rao, was impleaded as the respondent in that application.

4. The respondent filed a counter contending that the All India Sai Samaj is not an institution coming within the scope of Madras Act XXII of 1959 and further denied the allegations of mismanagement and acts of omission and commission on the part of the management. The All India Sai Samaj also filed O.A. No. 30 of 1965 before the Deputy Commissioner praying that the applicability of the provisions of the Madras Hindu Religious and Charitable Endowments Act to the All India Sai Samaj may be enquired into as a preliminary issue in O.A. No. 86 of 1964 under section 63 (*a*) of the Act. The Deputy Commissioner took up for consideration the preliminary issue *viz.*, whether the Sai Mandir situate in Mylapore is a religious institution as defined in the Act. Before the Deputy Commissioner Exhibits A-1 to A-10 on behalf of the petitioner and Exhibits R.1 to R. 5 on behalf of the respondent were filed and P.Ws. 1 to 3 and R.Ws. 1 to 3 were examined. The Deputy Commissioner ultimately came to the conclusion that the 'Sai Mandir' is a religious institution falling within section 6 (18) of the Act. The

present writ petition out of which this appeal has arisen was filed seeking to quash the order of the Deputy Commissioner.

5. In the affidavit filed in support of the writ petition the history of the institution is traced and we shall briefly set out the history. The founder of the Sai Mandir was Narasimha Swamiji, who came to Madras in 1940 and began to propagate 'Sai Bhakthi' going about with a big photograph of Sri Sai Baba of Shirdi requesting people to arrange for discourses in schools and public places on the life and teachings of Sai Baba. He appealed for funds for building a Sai Mandir at Mylapore for Sai devotees. He founded the Sai Samaj in 1941, acquired the present site in Alamelumangapuram, Mylapore in the name of the All India Sai Samaj, constructed the present *sanctum sanctorum* with a main front hall and later put up buildings for a free dispensary, printing press, book depot, office, library etc. The All India Sai Samaj was registered on 29th October, 1956 and the Swamiji prior to his death in 1956 made over the Sai Mandir and its properties to the All India Sai Samaj which has been managing the same ever since. The said samaj is a voluntary association, membership to which is open to all adults belonging to all religions, who believe in the worship of Sai Baba of Shirdi and his teachings and mission and to carry on the worship to Sai Baba by means of prayer, bhajan, discourses, harathi, puja etc. The membership in the Samaj included Hindus, Christians, Mohammedans and Parsis and Sai Mandir has been visited by all the devotees irrespective of the religion to which they belonged. In the Executive Committee there was a Muslim and two Muslims acted as Vice-Presidents. Worship in the temple is being done only to the picture of Sai Baba and members belonging to other faiths come to the temple and worship in their own way. The contention, therefore, is that the Sai Temple is not a religious institution dedicated to 'Hindus', exclusively and as such the Act is inapplicable thereto.

6. On the other hand, the complaint of the appellants, who were the respondents in the writ petition is that the affairs of the Samaj are mismanaged and a scheme is necessary for its proper administration, that Sai Mandir is a Hindu Religious Institution, falling under the provisions of the Hindu Religious and Charitable Endowments Act, 1959, that the temple constructed was dedicated to the Hindu public, that Kumbabishekam and the other ceremonies relating to installation were performed as per the Agama Sastras, that worship in the temple is carried on by the Hindu Brahmin priests as is done in all the Hindu temples, that the daily archanas, Ashtotrams, Sahasranamams etc., in the name of Sri Sai Baba are conducted in the Hindu way, that no other forms of worship of other communities, such as, Mohammedans or Christians or Parasis is conducted in the temple, that the worshippers bring flowers, cocoanuts etc., for archanas, their names and gotrams are asked for by the priests and archanas are performed in the name of the devotee, that prasadams, such as vibhuthi, kumkum, theertham, akshadai flowers etc., are offered to the devotees, that Sadari is placed on their heads, that all these forms of worship, which are usually observed in the Hindu temples, are observed in this institution and none of the observances in a mosque or a church are followed in this temple, that festivals that are being celebrated are only Hindu festivals and none of the non-Hindu festivals, such as Bakrid, Moharram, Ramzan, Christmas or Good Friday are observed, that Jayanthi is celebrated on Rama Navami day and all those factors establish the dedication of Sai Mandir to the Hindu Public alone and that the mere fact that the Samaj consists of members of all religions is immaterial, that the circumstance that some of the office bearers or members of the Executive Committee are non-Hindus do not alter the character of the Sai Temple, which is a 'Hindu' temple.

7. On behalf of the Samaj, a reply statement was filed wherein it was stated that the only worship in the temple is the worship of Sai Baba, that no daily puja such as is done in a Hindu temple, is done in this temple, that the temple priests at the instance of devotees performed archanas, sahasranamams etc., that devotees are free to worship in their own way and that no other form of worship is conducted in the temple.

8. The Deputy Commissioner in his order emphasised the fact that the worship in the Mandir is conducted in the Hindu way, that Tiruvadi of Sri Sai Baba, is carved in marble stone, that the mere fact, that one or two Muslims visit the temple occasionally or that membership of the Samaj is open to all communities or that in the management non-Hindus are associated, does not render the Sai Temple a temple outside the purview of the Act. In the result, the Deputy Commissioner held on the preliminary issue that the Sai Mandir is a place of Hindu worship to which the provisions of the Act will apply. The respondent filed the above writ petitions against which this appeal is filed, to quash the above order of the Deputy Commissioner.

9 Kailasam, J. after over-ruling the preliminary objection that the interlocutory order passed in a main petition cannot be challenged in a writ petition held the question raised goes to the root of the matter and involves the application of the Act to the institution in question. The learned Judge in considering the question of the applicapility of the Act to the institution in question referred to the following salient features established which run as follows :—

> " It is common ground that Hindus, Parsis, Muslims, and Christians are members of the Samaj. It is also not in dispute that in the Executive Committee, there was a Muslim and two Muslims acted as Vice-Presidents of the Samaj for a number of years. The membership is open to all adults belonging to all faiths. According to the Rules of the All India Sai Samaj, the only worship that could be carried in the Sai Mandir shall be that of Sai Baba's picture and no image of Sai Baba or of anyone else shall be admitted into the Mandir. Pictures of other saints. Avatars or anyone else can only be kept in other parts of the Samaj, if the Executive Committee so decides. It is also found by the first respondent that at the time of the dedication of the temple, several rites which are performed in the conscretation of a Hindu temple were performed. Brahmin priests perform the worship and Sahasranamam, Ashtothram and Harathi are performed."

Kailasam, J., after referring to the preamble of the Act and the definition of Religious institution under section 6 (18) and of a temple under section 6 (20) of the Act and the two Bench decisions of this Court *viz.*, *State of Madras* v. *Seshachalam Chettiar Charities*[1], and *Sri Ramanasramam* v. *Commissioner, Hindu Religious and Charitable Enhowments Mahras*[2] held that the definition of the word ' temple' as construed by the above decisions makes it clear that the place of worship should be dedicated exclusively for the benefit of the Hindu community and that it should be exclusively a place of Hindu public religious worship in order to attract the Act. The learned Judge held that the above two tests are not satisfied in the case of the Sai Mandir at Mylapore. The learned Judge in the concluding paragraph observed as follows :

> "While accepting the facts, the Deputy Commissioner has come to the conclusion that Sai Mandir is a Hindu Religious institution mainly on the ground that the Mandir was dedicated to the public and that there was no evidence that Narasimha Swamiji who is a promoter of the All India Sai Samaj intended not to throw open the suit-Mandir to the Hindu public. The Deputy Commissioner proceeds to discuss the evidence and concludes that the rituals conducted were in accordance with the Hindu Sastras and therefore it should be concluded that the dedication of the Mandir is to the Hindu public. The conclusion arrived at by the Deputy Commissioner is erroneous on the face of the record. The Deputy Commissioner is in error in stating that the founder of the suit-Mandir is Narasimha Swamiji and not the All India Sai Samaj. The records show that the properties were purchased by the All India Sai Samaj and that the Sai Samaj constructed the Mandir and that the property continues to be in the name of the Sai Samaj. The Deputy Commissioner has failed to take note of the fact that the All India Sai Samaj was a cosmopolitan institution having in its roll members belonging to all religions. From the mere fact that when

1. (1960) 2 M.L.J. 591 : (1960) L.W. 794.
2. (1972) 2 M.L.J. 121 : I.L.R. 1960 Mad. 922 ; A.I.R. 1961 Mad. 265.

the Sai Mandir was consecrated, certain rituals which are usually performed in Hindu temples were performed would not in any way establish that the Mandir is a Hindu temple. It has to be noted that there is no *Prathishta* as there is no idol. The worship is only of that of Sai Baba's picture and the mere fact that certain homams were performed would not prove that the Mandir was dedicated exclusively to the Hindu public. It may be noted that the Deputy Commissioner has observed that "there is no evidence that the intention of Narasimha Swamiji then was not to throw open the suit-Mandir to the Hindu public". But in the end, he finds that it had been proved that the dedication of the Sai Mandir is to the Hindu public. This conclusion is not borne out by the record and is contrary to the facts established in this case and has to be rejected. The Deputy Commissioner also relied on the fact that the worship in the Mandir is conducted according to Hindu form by Brahmin priests. This would not in any way satisfy the requirements that the place should be one of worship exclusively by the Hindu public. Persons professing other religions also as of right worship in the shrine though the Hindu form of worship is conducted by Brahmin priests. On the records, there is no material for the Deputy Commissioner to come to the conclusion that the Sai Mandir is a Hindu Religious institution. The order is vitiated by material error apparent on the face of the record."

The present appeal is filed against the said order.

10. Sri N. Panchapakesa Iyer, the learned Counsel for the appellant contends: (1) The order of the Deputy Commissioner under section 63 (*a*) of the Hindu Religious and Charitable Endowments Act is appealable to the Commissioner and as a right of suit is provided under section 70 (1) of the Act, the interference by this Court against the order of the Deputy Commissioner is not called for;

(2) The determination under section 63 (*a*) is a factual determination on materials placed and therefore in a properly framed suit all the necessary evidence will be adduced and the matter ought to have been referred to a suit in a civil Court;

(3) The Kumbabhishekam and other homams having been done, according to Agama Sastras the Sai Mandir is a place of public religious worship dedicated to or used as of right by the Hindu community and therefore is a temple within the meaning of section 6 (20) of the Act.

(4) Non-Hindus who are allowed to worship in the Mandir do not worship in their own way and occasional worship by them does not take the temple away from the application of the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959).

11. At one stage we considered that it would be proper to refer the controversy in question to a civil Court where disputed questions of fact could be gone into and a final decision arrived at and we asked the learned Counsel for the appellants whether there was any other clinching material other than what has been filed before the Deputy Commissioner already but the learned Counsel was unable to say that there is any fresh material, but generally contended that this is a fit matter for adjudication by a civil Court. The entire material that was filed before the Deputy Commissioner was produced before Kailasam, J. The learned Counsel for the appellants stated that he had no copy of the depositions or documents and we called upon the learned Counsel for the respondents to furnish copies of the entire material to the learned Counsel for the appellants and adjourned the matter for a few days to enable him to study the the records. We were taken through the entire material at the adjourned hearing.

12. We have, therefore, to consider whether the Sai Mandir is a Hindu Religious institution dedicated to the Hindu public. We shall recapitulate the facts established. The Sai Baba of Shirdi was a Brahmin by birth, but was brought up by a Mohammedan and lived in Mohammedan environment. He preached universal religion based on love, equality and justice and the gospel that he preached attracted a large number of followers pursuing different faiths. In 1941 the late B.V. Narasimha Iyer otherwise known as Sath Guru Narasimha Swami-

ji having caught the fire of Sai Bakthi founded in Mylapore the Samaj known as All India Sai Samaj. The said Samaj was functioning at several places in Mylapore and the need for an exclusive and spacious place of worship was felt and the Swamiji strove hard to collect funds to acquire a piece of land and construct a Mandir for Sai Baba. Out of donations received and collections made the present site at Alamelumangapuram was acquired and a Mandir was put up in the main front hall. Later on he put up buildings for a free dispensary, printing press, book depot, office library etc. The All India Sai Samaj was registered under the Societies Registration Act in 1956. The objects of the Samaj are (1) to spread and deepen faith in God more especially with reference to Sri Sai Baba of Shirdi, (2) to diffuse useful knowledge for the above purpose through publication of books, pamphlets, journals etc. regarding Sai Baba, (3) to arrange Lectures and Harathi for Sri Sai Baba etc. The Executive Committee of the Samaj was composed of Hindus and also a Muslim. Under the Rules of the All India Sai Samaj membership was open to all adults. A perusal of the list of members shows inclusion of persons of different faiths, Mohammedans, Christians Parsis, some of them having served on the Executive Committee of the management and one of them as the Vice-President of the Samaj. The construction of the Mandir was completed in or about 1953 and the Swamiji, who passed away in October, 1956, took care to see that the Samaj was made a registered body with an Executive Committee to carry on the administration and the temple and other properties of the Samaj were made over to the registered body.

13. The question for consideration is whether the Sai Mandir, Mylapore, is a temple within the meaning of section 6 (20) of the Madras Hindu Religious and Charitable Endowments Act, 1959 which we shall hereafter refer to as 'the Act'. In considering this question it is necessary to consider the scope and the effect of the the Act. The preamble of the Act is to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments. Under section 1 (3) of the Act the application of the Act is to all Hindu public religious institutions and endowments. Section 3 of the Act confers power on the Government to extend the Act to any Hindu or Jain public charitable endowment if mismanaged. Religious Institutions may either be Hindu Religious Institutions or Christian Religious Institutions or Muslim Religious Institutions. But the Act is intended to apply only to Hindu Religious institutions. The question then will be whether the institutions which are composite in character *viz.*, partly Hindu and partly Mohammedan or Christian would fall under the provisions of the Act. We may in this connection refer to other provisions of the Act particularly to section 10 which provides that a Commissioner, Deputy Commisioner, Assistant Commissioner and every other officer or servant appointed to carry out the purposes of this Act, shall be a person professing the Hindu religion and shall cease to hold office as such when he ceases to profess that religion. Section 26, which deals with qualifications of trustees of any religious institution, states that a person shall be disqualified from being appointed as a trustee of any religious institution, if he does not profess the Hindu Religion. These provisions are clear indications that the Act applies to religious institutions and endowments which are exclusively Hindu in character.

14. In *The Urumu Seshachalam Chettiar Charities, Tiruchirapalli by its Board of Trustees* v. *The State of Madras and others*[1], Balakrishna Ayyar, J., had occasion to consider the validity of the order of the Government in extending section 3 of the Act, (XIX of 1951) (previous Act) to *Urumu Seshachalam Chettiar Charities*[1]. The learned Judge was of opinion that the Act is intended to apply only to religious institutions and endowments which are exclusively Hindu in character although the word "exclusively" is not added. to the words "Hindu Public Religious Institutions and Endowments" or in the definition of the word "temple" in section 6 (20) of the Act. The following passage in the judgment of Balakrishna Ayyar, J., may be usefully extracted in this connection:—

" I would draw attention to the words ' Hindu Religious and Charitable Insti-

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1. W.P. No. 1034 of 1957 (unreported).

tutions and Endowments' occurring in both the long title and the preamble. The Act is intended to apply to (1) Hindu *religious* institutions and endowments, and, (2) Hindu *charitable* institutions and endowments. It seems to me to be manifest that the word 'Hindu' is not used in one sense in relation to religious institutions and endowments and in another sense in relation to charitable institutions and endowments. The word 'Hindu' must be given the same connotation whether it is read in connection with religious institutions and endowments or whether it is read in connection with charitable institutions and endowments. Now, we can have a Hindu religious institution or a Christian religious institution or a Muslim religious institution. But, I do not see how we can have a religious institution which is at one and the same time partly Hindu and partly Christian or partly Muslim. I am not aware that any religious institution exists in the State which bears such a composite character. There can be no doubt whatever that so far as religious institutions are concerned the Act is intended to apply only to religious institutions and endowments which are exclusively Hindu in character. The omission of the word 'exclusively', on which Mr. Srinivasan laid stress, is of no consequence. In fact, the introduction of such a qualifying word was entirely unnecessary and would only have led to confusion and controversy in other places in the Act. The expression 'Hindu temple' is plain enough. By saying 'exclusively Hindu temple' we are not making the meaning plainer, we are only introducing a degree of annoyance."

The learned Judge further observed as follows:

"Secti n 9 of the Act enjoins that the Commissioner, every Deputy Commissioner, every Assistant Commissioner and every other officer or servant appointed to carry out the purposes of the Act, by whomsoever appointed, shall be a Hindu. The section also enacts that should a person so appointed cease to be a Hindu he shall also cease to hold office. Likewise, section 22, requires that no person, shall be appointed to be a trustee of a religiuus institution.: ..unless he is a Hindu. Provisions of this kind would be appropriate only in respect of institutions which are exclusively Hindu. The Legislature could hardly have intended that provisions of this kind should apply to what may be called mixed or composite institutions, that is to say, institutions which are only partly Hindu and partly non-Hindu. That would amount to discrimination based on religion. It would also probably be correct to say.. ....that the Act would apply to institutions which are exclusively Hindu in character".

Construing the deed of trust in that case the learned Judge came to the conclusion that the institution or endowment set up by the deed of trust is not exclusively, Hindu in character and consequently section 3 of the Act is not attracted.

15. In *Sri Ramanasramam by its Secretary, G. Sambasiva Rao and others* v. *The Commissioner for Hindu Religious and Charitable Endowments, Madras*[1], Ramaswami, J., and Anantanarayanan, J., as he then was, had to consider the question whether Mathrubootheswarar temple a component part of Ramanasramam at Thiruvannamalai is a temple as contemplated by section 6 (17) of the 1951 Act. Ramaswami, J., who delivered the leading judgment after referring to three authoritative works on Hindu Religiuos Endowments namely (1) Pandit Pran Nath Saraswathi's Hindu Law of Endowments, (2) P. R. Ganapathi Ayyar's Hindu and Mohammadan Endowments and (3) B. K. Mukherjee's Hindu Law of Religious and Charitable Trust and some of the decisions including the one of Balakrishna Ayyar, J., referred to above, came to the conclusion that

"The evidence in the instant case showed that this institution, is a composite institution and is in accordance with Sri Ramana Maharishi's universal outlook making his Asramam open to devotees of all religions —The contributions came also largely from non-Hindus—It stands to commonsense also that no exclusively Hindu shrine

1. (1960) 2 M.L.J. 121 : I.L.R. (1960) Mad. 922.

would be an appendage of a cosmopolitan Asramam, and which would have been totally inconsistent with Sri Ramana Maharishi's teachings and life".

After dealing with the evidence the learned Judge held that the institution called Mathruboothcswaraswami is only a Samadhi and not a temple and that it cannot be said that there has been a dedication exclusively to the Hindu public or a section thereof. Anantanarayanan, J., in a separate judgment agreeing with the view of Ramaswami, J., expressed as follows:—

"The probabilities are overwhelming that, as far as the founder's message, intentions and outlook are concerned the Mathrubutheswar shrine was not founded as a Hindu temple, but essentially as a public religious shrine or institution of a universal character. The evidence on record clearly establishes further that it is not a place of Hindu public religious worship though the forms of puja or archana might be similar to those adopted in Hindu temples but that it is a shrine in which all who are drawn to the Maharishi's teachings, whether Hindu, Christian, Parsi or Muslim, have equal rights of access and to the acquisition of spiritual benefit by prayer or meditation".

16. In the *State of Madras by the Secretary, Revenue Department, Madras and another* v. *The Urumu Seshachalam Chettiar Charities, Tiruchirapalli, by its Board of Trustees and others*[1], Rajagopalan and Srinivasan, JJ., affirmed the view of Balakrishna Ayyar, J. in the writ petition referred to above. Rajagopalan, J., who delivered the judgment on behalf of the Bench at page 594 dealing with charitable endowments obse ved as follows:

"If we split up section 6 (4) into some of its component parts the resultant position is: (1) charitable endcmwent means all property given or endowed for the benefit of the Hindu community or any section thereof; (2) charitable endowment means all propeity given or endowed for the support or maintenance of objects of the utility to the Hindu community or any section thereof; (3) charitable endowment means all property used as of right by the Hindu community or any section thereof. The institutions themselves in each of these cases are included in the statutory expression 'charitable endowment'. Of course, the word 'exclusively' is not to be found in the definition. If that word can be read with this clause, that has to be read with reference to each of the three clauses who have mentioned above, that is, the endowment should be for the exclusive benefit of the Hindu community, or it should be used as of right exclusively by the Hindu community, or it should be for the suppcrt or maintenance of the objects of utility exclusively to the Hindu community. The use of the prefix 'Hindu' should have the same significance with reference to charitable and religious endowments for the purposes of the Act. We have already pointed out that a temple is a religious endowment. Temple has been defined in section 6 (17) of the Act:

'temple' means a place by whatever, designation known, used as a place of public religious worship and dedication to, or for the benefit of or used as of right by, the Hindu community or any section thereof as a place of public religious worship.

It seems clear to us that the very definition of temple in section 6 (17) of the Act postulates the test of exclusiveness. It will not be a temple at all as defined in section 6 (17) of the Act, if it is not dedicated for the benefit exclusively of the Hindu community or if it is not used as of right exclusively by the Hindu community. A place of public worship used as of right by members of all communities including the Hindus cannot be a temple as defined by section 6 (17) much less can it be viewed as a Hindu temple or a Hindu religious endowment. The expressions 'for the benefit of' and 'used as of right by the Hindu community' should, in our opinion have the same significance in relation to charitable endowments as they have in relation to temples which are religious endowments. They should have the same meaning in construing either section 6 (4) or section 6 (17). In our opinion, even apart from the prefix 'Hindu' in relation to

1. (1960) 2 M.L.J. 591 : (1960) L.W. 794.

public charitable endowments in section 3, the very definition of charitable endowments in section 6 (4) postulates the test of exclusiveness. Unless, for example, the benefit of the endowment is confined wholly to Hindus it would not be a charitable endowment as defined by section 6 (4). The prefix 'Hindu' to the expression 'public charitable endowment' in section 3 tends, if anything, to emphasise that feature. When the benefit of the endowments is made such a decisive feature of the statutory concept of a charitable endowment by the definition in section 6 (4) of the Act we can see no scope for accepting the contention of the learned Advocate-General, that who the beneficiaries of the trust are is not determinative of the question what constitutes a Hindu public charitable endowment for purposes of section 3 of the Act.

The learned Advocate-General submitted that anomalous results might follow if the test of exclusiveness were adopted in determining what constitutes a Hindu public charitable endowment within the scope of section 3 of the Act. The learned Advocate-General pointed out that normally no Hindu would contemplate exclusion of members of other communities from the benefit of the public charity familiarly known as a water pandal, if he were founding such a public charity. That was given only as an example. Establishment of a water pandal charity may be establishment of a public charitable endowment. But it is not every public charitable endowment that is brought within the scope of Act XIX of 1951. Every public charitable endowment founded by a Hindu does not become a Hindu charitable endowment. The mere fact that the founder was a Hindu is not enough even to make a trust or endowment a charitable endowment as defined by section 6 (4) of the Act. Certainly it is not enough to make it a Hindu public charitable endowment. To bring a public charitable endowment within the scope of section 3 of the Act it is necessary to establish first that it is a Hindu charitable endowment. It will not be a Hindu charitable endowment, if the benefit of the endowment can be shared as of right by members of the public other than Hindus".

Though the above decision related to a charitable endowment we are of opinion that the same principle will apply to a religious institution as well.

17. In *Shanmugha Perayyar* v. *State of Madras, represented by the Secretary, Home Department, Government of Madras*[1], to which one of us was a party, the above decisions were referred to and followed and at page 417, it is observed as follows :

"Taking it for granted that the founder of the charity was an ancestor of the petitioner and he was a Hindu, it does not follow necessarily from that fact alone that his intention was to confine the charity to the Hindu wayfarers exclusively. The water pandal chari y may be incidental to feeding all wayfarers. But inasmuch as feeding wayferers does not appear to have been confined exclusively to the Hindus, the result follows that it will not be governed by the provisions of Madras Act XIX of 1951".

18. The contention of Sri Panchapakesa Iyer is that this Act will apply to this institution as Prathista, according to Agama Sastras, has been conducted under the guidance of Narasimhaswami. 'Temple' is defined in section 6 (20) of the Act as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community. The essential features of a temple have been referred to by Viswanatha Sastri, J., in *T.R.K. Ramaswami Servai and another* v. *The Board of Commissioners for the Hindu Religious Endowments, Madras, through its President*[2], which arose out of the difference of opinion of Satyanarayana Rao, J., and Govinda Menon, J., At page 516, Viswanatha Sastri, J., observed as follows:

"In the case of a temple it becomes a place of public religious worship when the idol was installed and consecrated and the pranaprathishta or vivification ceremony was performed. Until then, it is elementary knowledge that the image does not become an

1. (1965) 1 M.L.J. 311 : I.L.R. (1965) 2 Mad. 505 : A.I.R. 1965 Mad. 416.
2. (1950) 2 M.L.J. 511 : I.L.R. (1950) Mad. 799 : A.I.R. 1951 Mad. 473.

object of worship. The deity does not begin to reside in the idol (the visible image) until the consecration or the appropriate ceremony is completed.. ......Unless and until these ceremonies are gone through, the place where the idol is installed, and the idol itself does not become a fit object of religious worship."

The procedure relating to purification of the image and the vivification ceremony and all the details relating thereto are referred to in Pandit Prannath Saraswathi's Hindu Law of Endowments (Tagore Law Lectures, 1892) at page 106. In the present case no idol of Sai Baba has been installed and in fact rule 20 of the memorandum of the Samaj shows that no image of Sai Baba should be brought into the Mandir and in the absence of the establishment of an idol and consecration of the same and the performance of pranaprathishta, the deity does not begin to reside in the idol so as to make it a proper object of religious worship.

19. Mr. Panchapakesa Iyer, next contended that even though there is no idol of Sai Baba, the padukas of Sri Sai Baba are embedded below the portrait of Sai Baba and consequently there is an indicia of an image and therefore the Mandir falls within the meaning of a temple as defined in the Act. We are unable to accept the said contention. In this connection our attention was drawn to the evidence adduced on behalf of the respondent. The substance of evidence adduced on behalf of the respondents is that Sai Baba was worshipped in the Vaidikiway and that the temple was erected for Sai Baba with yantra stapanam and kumbhabhishekam performed. Srividya Homam for three days, Mahasudrasana japam for a day, Modha Dakshinamurthy mantra japa and homams for a day were conducted by four or five priests prior to the construction of Gopuram and after Gopuram was constructed Sri Chakra Yantram was installed in the middle of the Garbha Griha, that after the installation ceremony Abhishekam and Archanais were performed, cocoanuts, flowers, dhoopam, deepam and Naivedyam were offered to Sai Baba picture. Theertham, Akhathai, Kunkumam were distributed to the devotees after puja is over and that sadari is placed on the devotee's head. Notwithstanding all this, in the absence of an idol, the Mandir cannot be said to be a proper object of religious worship.

20. The further evidence adduced was that Muslims and Christians do not come to the Mandir. The other materials adduced on behalf of the respondents clearly establish that non-Hindus also visit the Mandir although they do not worship Sai Baba in their own way. There is abundance of evidence that the respondent-Society consists of Hindus and non-Hindus, some of the non-Hindus have been members of the Executive Committee and also have acted as Vice-President for long periods. The materials produced amply demonstrate that the Sai Mandir is not a place of public religious worship dedicated solely to the members of the Hindu community. The Deputy Commissioner came to the conclusion that the majority of the worshippers were only Hindus and the mere fact that one or two Muslims visit the suit Mandir. occasionally will not alter the general character of a Hindu temple. This proposition runs counter to the decisions referred to above and we are of opinion that Sai temple is not exclusively dedicated to or used as of right by the Hindu community exclusively. The Deputy Commissioner further observed that the character of the temple can be determined only by the form of worship and not by the circumstance that a few-non-Hindus visit the temple, but such non-Hindus do not worship in their own way. We are of opinion that there is no warrant for the above conclusion of the, Deputy Commissioner. Kailasam, J., rightly interfered with the order of the Deputy Commissioner. There is no substance in any of the contentions put forward by the learned Counsel for the appellants.

21. The appeal, therefore, fails and is dismissed with costs of the respondents which we fix at Rs. 250.

22. Appellants 1 to 5 will pay the costs of the Respondent.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

Gopalakrishna Mudaliar and others .. *Appellants**

v.

Rajan Kattalai of Sri Thiyagarajaswami Devastanam by its Trustee Sri La Sri Subramaniya Desiga Gnanasambanda Pandara Sannadhi and others .. *Respondents.*

(A) *Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of* 1963), *section* 41—*Minor inam—Arrears of rent payable to inamdar—Discharge by payment of rent for three fasli years—Applicable only to a ryot in occupation of ryoti lands.*

Section 41 of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act providing for the payment of arrears of rent due on the appointed day under the Act has no application to persons who are not ryots and the lands in respect of which arrears are due are not ryoti lands. [*Para.* 3.]

Section 41 (1) of the Act uses the expression 'arrears of rent payable by a person' while sub-sections (2) and (3) use the expression 'ryoti' with reference to the arrears of rent. Even though sub-section (1) uses the expressions 'person', sub-section (2) makes it clear that the person referred to and contemplated in sub-section (1) is only a ryot and not any other person. [*Para.* 3.]

(B) *Landlord and Tenant—Lease—Stipulation for unconditional rent—No remission absolutely—Cyclone or presence of cultivating tenants in occupation—Rent—Lessee not to be relieved against—Contract Act (IX of* 1872), *section* 56.

Where the lease itself stipulates that the rent is an unconditional rent and it is not subject to acts of State and God and that under no condition whatever any remission in the rent shall be given, the lessee cannot be relieved of his obligation to pay the stipulated rent either on account of cyclone or on account of the presence of cultivating tenants. [*Para.* 4.]

Cases referred to :

Velur Devasthanam by sole trustee Sri La Sri Subramania Desika Gnanasambanda Pandara Sannadhi Avergal v. *S. Sundaram Nainar*, (1959) 1 M.L.J. 24; *Sri Mahalingaswami Devasthanam, Tiruvadamarudur by its hereditary trustee Sri La Sri Subramania Pandara Sannadhi, Adheenakartha, Tiruvaduthurai Mutt* v. *A.T. Sambanda Mudaliar*, 74 L.W. 716: I.L.R. (1962) Mad. 273: A.I.R. 1962 Mad. 122; *Sri Amuruvi Perumal Devasthanam* v. *K. R. Sabapathi Pillai and another*, 74 L.W. 723: I.L.R. (1962) Mad. 252: (1962) 2 M.L.J. 452; *Sri Kampaharaswaraswami Devasthanam of Thirubuvanam, represented by its sole and hereditary trustee Sri La Sri Subramania Desika Gnanasambanda Pandara Sannadhi Avergal, Adhinakartha of Dharmapuram Mutt* v. *Appasami Padayachi and* 5 *others*, A.S.No. 1172 of 1953; *Sri Parimala Ranganathaswami Devasthanam, Tiruvilandur by Excecutive Officer P. S. Gopalaswamy* v. *S. Muthuswami Iyer*, (1962) 2 M.L.J. 203.

Appeal against the decree of the Court of the Subordinate Judge of Nagapattinam in Original Suit No. 16 of 1962, and Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner herein to raise the following additional grounds in the memorandum of appeal, namely:

"14 (*a*): The learned Judge should have held that the claim for the alleged arrears of rent payable up to before three years of the suit is barred by limitation.

"14 (*b*): In any event, the Court below should have held that the claim for the alleged arrears of rent for fasli 1365 and 1366 is not sustainable as it is barred by limitation". and petition praying the High Court to grant leave to the petitioner to amend the written statement by adding the following paragraph.

"9 (*a*) The claim for the alleged arrears of rent which became due before three years of the suit is barred by limitation".

R.G. Rajan and *A. R. Krishnan* for Appellants.

* A. No. 130 of 1967 and C.M.P. Nos. 6425 and 6426 of 1973. *9th July*, 1973.

V. Vedantachari, *W. C. Thiruvengadam* and *G. Nagaraj*, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—The defendants in O.S. No. 16 of 1962, on the file of the Court of the Subordinate Judge, Nagapattinam, are the appellants herein. Since the facts are not in controversy and the appeal itself was argued before us on a very narrow ground, we do not propose to elaborately refer to the pleadings of the parties and the numerous issues raised by the trial Court. Admittedly, the suit lands of an extent of 89.58 acres in Pallankoil Village belonged to the respondent herein. The said lands were leased out to the appellants herein for five faslis, from fasli 1365 to fasli 1369 under Exhibit A-1 dated 31st December, 1955, a registered lease deed. The annual rent fixed was 711 kalams of paddy and Rs. 200 in cash. On the allegation that the appellants herein were in arrears of rent for the five faslis in different amounts, the suit was instituted for the recovery of a sum of Rs. 20,117.22 with a charge on the secured properties either for the whole amount, or for a sum of Rs. 5,500. The prayer with regard to the charge in the alternative form came to be made in view of the fact that the first appellant alone was the lessee and the second appellant joined in the execution of the lease deed only as a surety and he stood surety only for Rs. 5,500, which represented one year's rent. We are not giving the details of the arrears for the simple reason that they were not disputed. The appellants herein raised various defences such as the lands constituting an estate and therefore the civil Court not having jurisdiction, there having been a severe cyclone in 1953-56 and thereby they having been relieved of their obligation to pay the entire rent and their not being able to take possession of the lands in view of the fact that the cultivating tenants were in occupation of the lands even on the date of the lease. During the pendency of the suit, Madras Acts XXVI and XXX of 1963 were enacted and brought into force. Therefore, in the additional written statement filed by them the appellants put forward the contention that the civil Court had no jurisdiction in view of the provisions of the Act as well. The Subordinate Judge's Court, by order dated 8th July, 1963, referred the matter to the Estates Abolition Tribunal, Thanjavur, which by its order dated 12th March, 1964, in O.A. No. 1 of 1963, held that the properties leased by the respondent formed only part of a village, that they did not constitute a named village and that Pallankoil in which the properties were situate was not an inam estate or an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act I of 1908 as amended by subsequent Acts and that it was only a minor inam. Finally, the matter was argued before the trial Court only on the basis of the lands being minor inam and the learned Subordinate Judge by judgment and decree dated 11th August, 1968, overruled the objections of the appellants and decreed the suit as prayed for by creating a charge over the secured properties for a sum of Rs. 5,500 only. It is against this judgment and decree, the present appeal has been filed.

2. Though various defences had been taken before the trial Court, Mr. R.G. Rajan, the learned Counsel for the appellants, addressed only four arguments before us. One was that, having regard to the provisions contained in section 41 of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (XXX of 1963), the appellants were not liable to pay the arrears of rent for all the five faslis and that if they had paid arrears in respect of any three faslis, the entire arrears must be deemed to have been wiped out. The second argument was that there had been a cyclone in 1955-56 and the appellants were not able to collect the full rent from the tenants who were in occupation of the lands and consequently they were not bound to pay the entire rent stipulated for. The third argument was that even in 1956 the appellants offered to surrender the lands to the respondent, but he did not accept the surrender and having failed to accept the surrender, it was not open to the respondent to collect the arrears of rent for all the five faslis. The last argument was that the arrears for the period in excess of three years immediately preceding the suit were barred by limitation and that therefore the trial Court could not have passed a decree in respect thereof.

3. We shall consider these arguments in the order in which we have referred to them above. As far as the first argument is concerned, as we pointed out already, the suit is of the year 1962. The Acts were of the year 1963 and consequently they came into force only during the pendency of the suit. In view of this alone, an additional written statement was filed before the trial Court and even with reference to section 41 of Act XXX of 1963 the defence was not taken in the form in which it is taken before us. Before us, the contention of the learned Counsel is that the language of section 41 prohibits the respondent-landord from collecting anything in excess of arrears for three fasli years and that even though the appellant had not offered to pay the arrears for three fasli years before the trial Court, in the grounds of appeal before this Court they have made such an offer and that in view of this, it must be held that the entire arrears must be deemed to have been discharged. For the purpose of considering this argument, it is necessary to extract section 41 of Madras Act XXX of 1963 in full:

"(1) Notwithstanding anything contained in this Act, in the case of a minor inam all arrears of rent payable by a person to an inamdar in respect of any land in such inam and outstanding on the appointed day, shall, to the extent to which such arrears are in excess of the rent due for three fasli years in respect of that land, be deemed to be discharged whether or not a decree had been obtained therefor if such person pays to the inamdar the arrears of rent due for a period of any three fasli years.

(2) In any suit or proceeding for the recovery of any arrears of rent referred to in sub-section (1), the Court or authority concerned shall, upon deposit in the Court or before the authority, or upon proof by the ryot of the payment of arrears of such rent for three fasli years, dismiss the suit or proceeding.

(3) If before the appointed day any decree or order has been passed in any suit or proceeding for the recovery of any arrears of rent due from a ryot, which is inconsistent with the provisions of this section, the Court or authority concerned shall, upon deposit in the Court or before the authority, or upon proof of the payment of the arrears of rent due from the ryot for any three fasli years and on the application of any person affected by such decree or order, whether or not he was a party thereto, vacate the decree or order:

Provided that nothing contained in this section shall apply to any suit or proceeding in which the decree or order has been satisfied in full, before the appointed day.

(4) The provisions of this section shall have effect notwithstanding anything inconsistent therewith contained in the Madras Estates Land (Reduction of Rent) Amendment Act, 1963.

Explanation.—For the removal of doubts it is hereby declared that the payment, or deposit of arrears of rent for three fasli years referred to in this section shall be payment or deposit made after the appointed day".

It will be seen that sub-section (1) of section 41 uses the expression 'arrears of rent payable by a person', while sub-sections (2) and (3) use the expression 'the ryot' with reference to the arrears of rent. In this case, admittedly, the appellants are not ryots and the lands which were the subject-matter of the lease, are not ryoti lands. Notwithstanding this, the argument of Mr. Rajan is that sub-section (1) of section 41 does not use the expression 'ryot', but uses the expression 'a person' and consequently that provision is not confined only to a ryot, but will apply to any person who is in arrears of rent in respect of any land in the minor inam. We are unable to accept this argument. Sub-section (2) uses the expression 'any arrears of rent referred to in sub-section (1)' and it also uses the expression 'the ryot' with reference to the person in arrears. Therefore, even though sub-section (1) uses the expression 'a person' sub-section (2) makes it clear that the person referred to and contemplated in sub-section (1) is only a ryot and not any other person. In view of this, it is unnecessary for us to consider any other aspect of the case in this behalf. So long as the appellants before us are not ryots and the lands

in respect of which arrears are due are not ryoti lands, section 41 has no application and therefore it is unnecessary for us to consider the other aspect of the case, whether the appellants can claim the benefit of section 41 in not having offered to pay the arrears for three faslis before the trial Court. Consequently, the first contention of the learned Counsel fails.

4. As far as the second contention is concerned, the lease itself makes it absolutely clear that the rent stipulated therein is an unconditional rent and it is not subject to acts of State and God and that under no condition whatever, any remission in the rent shall be given. In view of these express provisions contained in the lease deed, it is not open to the appellants to put forward the contention that they must be relieved of their obligation to pay the stipulated rent either on account of the cyclone or on account of the alleged presence of the cultivating tenants on the lands. That was the view taken by Ramaswami, J., in *Velur Devasthanam by sole trustee Sri La Sri Subramania Desika Gnanasambanda Pandara Sannadhi Avergal* v. *S. Sundaram Nainar*[1], by Jagadisan, J., in *Sri Mahalingaswami Devasthanam, Tiruvadamarudur by its hereditary trustee Sri La Sri Subramania Pandara Sannadhi, Adheenakartha, Thiruvaduthurai Mutt* v. *A. T. Sambanda Mudaliar*[2], by a Bench of this Court (Jagadisan and Venkatadri, JJ.) in *Sri Amuruvi Perumal Devasthanam* v. *K. R. Sabapathi Pillai and another*[3] and another Bench of this Court (Rajamannar, C.J., and Ramachandra Iyer, J.) in an unreported decision in *Sri Kampahareswaraswami Devasthanam of Thirubuvanam represented by its sole and hereditary trustee Sri La Sri Subramania Desika Gnanasambanda Pandara Sannadhi Avergal, Adhinakartha of Dharmapuram Mutt* v. *Appasami Padayachi and 5 others*[4] and by yet another Bench of this Court (Ganapatia Pillai and Venkataraman, JJ.), in *Sri Parimala Ranganathaswami Devasthanam-Tiruvilandur by Executive Officer P. S. Gopalaswamy* v. *S. Muthuswami Iyer*[5]. In view of this position, as settled by this Court, the appellants are not entitled to any relief on this score.

5. As far as the third argument is concerned, the written statement of the appellants itself did not proceed on the basis that they were not able to take possession of the lands. There is nothing to show that under the contract between the parties the respondent herein could not and did not deliver possession of the lands to the appellants. On the other hand, the offer of surrender itself was made only subsequent to the cyclone in 1955 after the lease had actually commenced and taken effect. In view of this, the appellants were not entitled to unlilaterally surrender possession of the lands before the expiry of the period stipulated for under Exhibit A-1. If there had been any failure on the part of the respondent to carry out any of the covenants it had entered into or which the law had imposed upon it, there may be something to be said in favour of the appellants, that they offered to surrender possession of the lands to the landlord on a breach of the covenant, that the landlord did not accept the surrender and that consequently the landlord was not entitled to enforce the terms of the contract. That not being the case, the landlord-respondent was not bound to accept the unilateral surrender offer made by the appellants and therefore on this ground the appellants are not entitled to any relief.

6. Then there remains the last ground. Admittedly, the lease deed in the present case, Exhibit A-1 was a registered one. Under Article 116 of the Schedule I to the Limitation Act of 1908 the period of limitation for a suit for compensation for the breach of a contract in writing and registered is six years. The arrears claimed in the present case is only for a period of five years. The period of limitation being six years, certainly the respondent was entitled to claim the arrears for the entire period of five years covered by the lease deed.

7. Under the circumstances, we are of the opinion that there are no merits in the appeal and the same fails and is dismissed. Having regard to the fact

1. (1959) 1 M.L.J. 24.
2. 74 L.W. 716 : I.L.R. (1962) Mad. 273 : A.I.R. 1962 Mad. 122.
3. 74 L.W. 723 : I.L.R. (1962) Mad. 252 : (1962) 2 M.L.J. 452 : A.I.R. 1962 Mad. 132.
4. A.S. No. 1172 of 1953.
5. (1962) 2 M.L.J. 203.

that the appellants themselves appear to have incurred a loss in the venture, we make no order as to costs. However, we make it clear that since the second appellant-second defendant died during the pendency of this appeal and his legal representatives have been brought on record, the decree as far as the second appellant is concerned can be executed only as against the assets of the deceased second appellant in the hands of his legal representatives.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

Velappa Gounder .. *Appellant**

v.

S. Bomma Pandithan .. *Respondent.*

Evidence Act (I of 1872), section 92—Suit for partition —Joint purchasers—Dispute as to real purchaser—If evidence can be let in—Parties to a document not a term of the document—Scope of section 92.

V and *B* were shown as purchasers in an instrument. Subsequently *V* filed a suit for partition and separate possession of his share. *B* contended that he had borrowed the money from *V* and *V*'s name was shown in the instrument only as security for the loan and no title was intended to be conferred. On the question whether *B* can let in evidence to prove his case,

Held, The plaintiff and the defendant fill the same character as purchasers. It is therefore open to the defendant to show that no title was intended to be conferred on the plaintiff by showing him as a purchaser under the document. [*Para.* 14.]

What section 92 of the Evidence Act prohibits is letting in evidence to contradict, vary or subtract from the terms of the instrument. The parties to a document are not and could not be considered to be a term of the instrument itself. In other words, it is open to a person to show who the real party to a document is and in what character and for what purpose a particular person was impleaded as a party to the document. That evidence will not in any way be considered as having relevance to the terms of the document itself. [*Para.* 15.]

Cases referred to :

Sait Balumal Dharamdas Firm v. *Venkata Chalapathi Rao,* 1954 M.W.N. 794 : (1955) 1 M.L.J. 12 : A.I.R. 1955 Mad. 78 ; *Rakkiayappa Goundar* v. *Chinnu Goundan,* I.L.R. (1954) Mad. 271 : (1953) 2 M.L.J. 450 : A.I.R. 1954 Mad. 84 ; *Firm Bolumal* v. *Venkatachalapathi Rao,* (1959) 2 An.W.R. 23 : A.I.R. 1959 A.P. 612 ; *Mulchand* v. *Madho,* I.L.R. 10 All. 421 ; *Muhammad Sultan Mohideen Ahmed Ansari* v. *Amathul Jalal,* 101 I.C. 653 : (1927) 52 M.L.J. 557: A.I.R. 1927 Mad. 1102 (2) ; *Ellur Ramayya Chetti* v. *Mannaru Chetti,* (1930) 32 L.W. 160 : 126 I.C. 492 : A.I.R. 1930 Mad. 590 ; *Viswanathan* v. *Abdul Wajid,* (1963) 3 S.C.R. 22 : A.I.R. 1963 S.C. 1 ; *Venkatasubbiah Chetty* v. *Govindarajulu Naidu,* (1908) I.L.R. 31 Mad. 45 : 18 M.L.J. 1 ; *Ram Narayan* v. *Kedar Nath,* A.I.R. 1965 Pat. 463.

Appeal against the decree of the Court of the Subordinate Judge of Madurai in Appeal Suit No. 545 of 1968, preferred against the decree of the Court of the District Munsif of Dindugal in Original Suit No. 883 of 1964.

R. Gandhi, for Appellant.

V. C. Viraraghavan, for Respondent.

The Court delivered the following

JUDGMENT.—A short and interesting point of law arises in the second appeal. The facts as found by the Courts below are these :—

2. The defendant-respondent borrowed a sum of Rs. 3,000 from the plaintiff-appellant and adding another sum of Rs. 3,000 of his own, he purchased the suit property under the original of Exhibit A-1, dated 22nd October, 1960 but the purchasers were shown as the plaintiff and defendant. It was the case of the defendant that as security for the loan of Rs. 3,000, the plaintiff's name was also shown as a purchaser under the document but no title was intended to be conferred on the plaintiff or was in fact conferred. The plaintiff filed the suit for partition and separate possession

* S.A. No. 733 of 1971. 2nd April, 1973.

of his one-half share alleging that he was a real purchaser having contributed Rs. 3,000 towards the sale consideration and that the plea raised in defence is barred under section 92 of the Evidence Act. Both the Courts below have held that the borrowing was true and that the defendant had also not discharged the debt. The Courts below also held, relying on the decision reported in *Sait Balumal Dharamdas Firm* v. *Venkata Chalapathi Rao*[1], and certain observations in *Rakkiayappa Goundar* v. *Chinnu Goundan*[2], that the defendant was not barred under section 92 of the Evidence Act from pleading that no title passed to the plaintiff under the original of Exhibit A-1.

3. In this second appeal, the learned Counsel for the appellant submitted that it was not open to the defendant to plead an oral agreement to treat Exhibit A-1 as security for the payment of the loan of Rs. 3,000 which is directly contradictory to the terms of the document itself. He also submitted that the defendant also could not rely on the surrounding circumstances in support of his plea.

4. In this connection he pointed out that the decision reported in *Sait Balumal Dharamdas firm* v. *Venkata Chalapathi Rao*[1], which was a decision of a single Judge was, on Letters Patent Appeal, reversed by a Bench of the Andhra Pradesh High Court reported in *Firm Bolumal* v. *Venkatachalapathi Rao*[3]. On the other hand the learned Counsel for the respondent submitted that section 92 of the Evidence Act, is not applicable at all to the facts of this case and that on the merits, the finding of the Courts below that the defendant borrowed a sum of Rs. 3,000 from the plaintiff and the plaintiff did not contribute any money towards the sale consideration, is not liable to be challenged in this second appeal as a finding of fact. As the controversy mainly centres round the applicability of section 92 of the Evidence Act, it would be useful to refer to the section and the relevant provisos which are in these terms :

> " Exclusion of evidence of oral agreement :—When the terms of any such contract, grant or other dispos'tion of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms : Provisos * * * *
>
> 2. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document * * *
>
> 6. Any fact may be proved which shows in what manner the language of a document is related to existing facts."

5. In *Firm Bolumal* v. *Venkatachalapathi Rao*[1], which considered the scope of section 92 and the 6th proviso the facts were these : The plaintiff filed a suit on a promissory note executed by the defendants for a sum of Rs. 1,400. The defence was that the second defendant obtained a charge decree for Rs. 2,000 against a third party and that decree was transferred to the plaintiff under a document for a sum of Rs. 600. It was his further case that at the time of assignment of this decree, the understanding between the plaintiff and the second defendant was that the assignment should serve as a security for the monies to be advanced by the plaintiff to the second defendant in future. The decree was executed by the plaintiff and in the execution proceedings the property was brought to sale and purchased by the second defendant for a sum of Rs. 1,400. The amount of Rs. 1,400 was deposited by the plaintiff for the second defen-

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1. (1954) M.W.N. 794 : (1955) 1 M.L.J. 12 : A.I.R. 1955 Mad. 78.
2. I.L.R. (1954) Mad. 271 : (1953) 2 M.L.J. 450 : A.I.R. 1954 Mad. 84.
3. (1959) 2 An.W.R. 23 : A.I.R. 1959 Andh. Pra. 612.

1. (1959) 2 An.W.R. 23 : A.I.R. 1959 Andh. Pra. 612.

dant and later withdrawn by him as assignee decree-holder. For this, before the deposit of the money, he got a promisory note for Rs. 1,400 executed by the second defendant. With respect to the plea of the second defendant, the plaintiff contended that it was not open to the second defendant to plead contrary to the terms of the assignment of the decree itself and that the assignment was as security for the amounts to be lent in future, while considering this question, with reference to the sixth proviso, the Division Bench held :

"It is clear from the terms of section 92 that the evidence of any oral agreement or statement is excluded for any of the purposes indicated therein unless it falls under any of the provisos. The question is whether the instant case attracts proviso 6. In our judgment, this proviso could be called in aid only in cases where the terms of a document are ambiguous. If the language of an instrument does not yield clear meaning and is open to two interpretations, extrinsic evidence of surrounding circumstances, could be adduced. But if the meaning of the words is clear and unequivocal and the intention of the parties is easily deducible therefrom it is not permissible to lead parole evidence to show that the document was not really what it purported to be."

6. With reference to the contenton that sections 94 and 95 permit the defendant to adduce evidence on the understanding of the parties the Court further observed:

"It is manifest from these two sections that it is only in cases where the terms of the document leave the question in doubt, that resort could be had to the proviso. But when a document is a straightforward one and presents to no difficulty in construing it, the proviso does not apply. We think that these two sections define the sphere of operation of proviso 6.

If the contrary view is adopted as correct, it would be rendering section 92 of the Evidence Act, otiose and also unduly enlarging the ambit of proviso 6 to section 92. Section 92 specifically prohibits evidence of any oral agreement or statement which would contradict, vary, add to or subtract from its terms. If, as stated by the learned Judge, oral evidence could be received to show that the terms of the document were really different from those expressed therein, it would amount to according permission to give evidence to contradict or vary those terms and as such it comes within the inhibitions of section 92. It could not be postulated that the Legislature intended to mullify the object of section 92 by enacting exceptions to that section. Exceptions or provisos to a section are not meant to render the section itself nugatory. We are reinforced in this opinion of ours by clear authority."

7. In *Rakkiayappa Goundar* v. *Chinnu Goundan*[1], the facts were these: The plaintiff in that case executed a sale deed for a sum of Rs. 29,500. The consideration was not paid actually but the defendant in whose favour the sale deed was executed, was directed to discharge the debts of the plaintiff's family aggregating to Rs. 29,500. The plaintiff's case was that he executed the sale deed in favour of the first defendant who was his uncle as a trustee with a direction that the defendant should sell sufficient properties and discharge the family debts of Rs. 29,500 and return whatever properties remained after paying the debts of the family. The suit was filed for recovery of the properties remaining afrer paying the debts to the extent of Rs. 29,500. It was in evidence that prior to the sale deed, a trust deed actully was executed but for some reason that deed was found to be invalid. It was also in evidence that the plaintiff's family was in heavy debts and that if the plaintiff himself had undertaken to sell the properties it might not realise the real value in the sale. Having regard to these facts and the actual relief asked for in the suit, namely the recovery of that portion which remained after satisfying the family debts, this Court held that it was open to the plaintiff if he wishes to establish an oral arrangement to reduce an out and

1. I.L.R. (1954) Mad. 271 : (1953) 2 M.L.J. 450 : A.I.R. 1954 Mad. 84.

out sale into a trust so as to take away the right of the first defendant to enjoy the properties and such a plea would not be hit by section 92 of the Evidence Act.

8. These decisions do not in any way help the appellant. They only recognise the well-known principle that a contemporaneous oral agreement which has the effect of contradicting, varying, adding to or subtracting from the terms of the contract cannot be pleaded as against the terms of a written document. But the main point for consideration is whether section 92 is at all applicable to the facts of this case.

9. As seen from the defence and the document Exhibit A-1 itself, the plaintiff and defendant are the purchasers. They are not contracting parties, in the sense that one is a proposer and the other acceptor or a vendor and a vendee but they fill the same character as purchasers. Section 92 bars evidence of any agreement varying the terms of the instrument "as between the parties to any such instrument." The learned Counsel for the respondent submitted that the words "parties to any such instrument" under section 92 referred to only the parties as transferor and transferee or vendor and vendee and not the person coming under the same character as vendor or purchaser or transferor or transferee.

10. In this connection he relied on the decision reported in *Mulchand* v. *Madho*[1] One Muralidhar executed a sale deed in favour of two brothers, one Ganga Prasad and Mulchand, jointly for a sum of Rs. 1,000. The plaintiff sued the defendant for ejectment from the premises alleging that he alone was the purchaser and that the defendant was only nominally associating with him in the deed. The defendant pleaded that section 92 is a bar for such a contention of the plaintiff. The Division Bench of the Allahabad High Court held :

> "We are of opinion that the answer to the learned Pandit's contention is to be found in the proper interpretation of the phrase, "as between the parties to any such instruments," the words 'the parties' being rightly read to imply the persons who on one side and on the other came together to make the contract. In the case before us, the 'parties' in this sense would be the vendor on the one part and the two vendees on the other part. "As between" the vendor and themselves, neither of the vendees would be heard to plead, or would be allowed to offer, oral evidence to show that both were not parties to the buying of his house. Neither vendees could, resist the vendor's claim for the price, or for any other relief properly arising to him out of the contract on a plea intended to show that one of the two was a nominal party only to the contract."

11. After referring to bonds and bills of exchange executed by other persons and the question arising in respect of the same, the Bench further observed :

> "But on the other hand, we think that this section would not apply to questions like that of the present case, raised by the parties on one side *inter se* and not affecting the other party to the contract, touching their relations to each other in the transaction. The evidence in this respect would be offered not to vary, contradict, add to, or subtract from the terms of the vendee's joint liability under the contract of purchase and sale from their vendor, but only to show *as between* themselves, the two vendees to wit, which was the real purchaser."

12. This decision was followed expressly in *Muhammad Sultan Mohideen Ahmed Ansari* v. *Amathul Jalal*[1], by Devadoss, J. That was a case where a Hindu father executed a sale deed in favour of his two sons. Originally when the sale deed was drafted and presented before the Sub-Registrar, the document showed that one brother has to take the A Schedule properties and the other the B Schedule properties. But there was the objection of the Sub-Registrar that either there should be two sale deeds separately in favour of the sons with respect to the separate properties or the entire properties should be conveyed to both the brothers jointly. On that objection

1. (1888) I.L.R. 10. All. 421.

1. 101 I.C. 653 : (1927) 52 M.L.J. 557: A.I.R. 1927 Mad. 1102 (2).

of the Sub-Registrar, he struck off that portion in the document which referred to and allowed A Schedule properties to one and the B Schedule properties to the other and had the document registered. Subsequently the pattas and other records were transferred in the name of the plaintiff in respect of the A Schedule properties and in the name of the defendant in respect of the B Schedule properties. The plaintiff contended that since the sale deed was taken in the joint names of both the plaintiff and the defendant each of them was entitled to a moiety of the whole property and no evidence could be adduced to show what the father intended that each should take. Overruling this objection, this Court held that section 92 is not applicable to a case were the parties stand in the same character as donees. For this view this Court cited the decision in *Mulchand* v. *Madho Ram*[1]. These two decisions were again considered and followed by this Court in *Ellur Ramayya Chetti* v. *Mannaru Chetti*[2]. In that case the facts were these: A document was executed in favour of a minor and his mother reciting that they should enjoy the properties with absolute rights. The case of the minor son was that though the document was in the name of his mother and himself, the mother received the property as guardian of the minor and for the benefit of the minor. The question for consideration was whether this plea was open to the minor son. It was held that the phrase "as between parties" in section 92 means as between persons who on the one side and on the other come together to make the contract and the section does not apply to questions raised by the parties on one side *inter se* and not affecting the other party to the contract, touching their relations to each other in the transaction.

13. The Supreme Court also in *Viswanathan* v. *Abdul Wajid*[3], has held that the admissibility of evidence to contradict the recitals in the document was not precluded by section 92 "as the dispute in the suit did not arise between the parties to the document but between persons who claimed under the executants of the documents", thereby suggesting that the words parties to the document in section 92 do not refer to a case where they fulfil the same characteras purchaser or vendor, donor or donee. These decisions have been cited in some of the text books on the law of evidence without any comment. (*Vide* Field on Law of Evidence, 10th Edition, Volume IV, page 3702 and Sarkar on Evidence, 12th Edition pages 776 and 777). Though in Sarkar on Evidence, there is some reference to certain other cases, where the term "the parties to an instrument" was considered to have a wider meaning, it was all referred to as obiter and *Mulchand* v. *Madho Ram*[1], is referred to as having been followed in a number of cases by the various High Courts.

14. In this case, the plaintiff and the defendant fill the same character as purchasers under the original of Exhibit A-1. It is therefore open to the defendant to show that no title was intended to be conferred on the plaintiff by showing him as a purchaser under the document.

15. The same result could also be reached from another angle. What section 92 prohibits is letting in evidence to contradict, vary or subtract from the terms of the instrument. The parties to a document are not and could not be considered to be a term of the instrument itself. In other words, it is open to a person to show who the real party to a document is and in what character and for what purpose a particular person was impleaded as a party to the document. That evidence will not in any way be considered as having relevance to the terms of the document itself. This was also the view taken in *Venkatasubbiah Chetty* v. *Govindarajulu Naidu*[2].

16. That was a case where the suit was filed for the recovery of an amount due on a bond executed by the first defendant. The plaintiff alleged that the first and the second defendants were partners and that the money was borrowed for the partnership and for partnership purposes. The

1. I.L.R. (1888) 10 All. 421.
2. (1930) 32 L.W. 160 : 126 I.C. 492 : A.I.R. 1930 Mad. 590.
3. (1963) 3 S.C.R. 22 : A.I.R. 1963 S.C. 1.

1. I.L.R. (1888) 10 All. 421.
2. (1908) I.L.R. 31 Mad. 45 : 18 M.L.J. 1.

Courts below held that since the bond was executed only by the first defendant it was not open to the plaintiff to let in oral evidence to show that the second defendants also was liable on the bond. Though he was not *eo nominee* a party to the instrument, a Division Bench of this Court held that there is nothing in section 91 or section 92 of the Evidence Act which prohibits such a plea. It was held further that a question as to who the contracting parties are was not one of the " terms of the contract " within the meaning of section 92 and that therefore it is open to the plaintiff to let in evidence to show that the second defendant was also liable under the bond. This decision was followed by the Patna High Court in *Ram Narayan* v. *Kedar Nath*[1]. In that case also it was held that the reference to the terms of the contract in sections 91 and 92 does not extend to the parties to the contract. What is excluded by section 92 is the oral evidence designed to contradict, vary, add to or substract from the terms agreed upon by the parties and not as to who the real contracting parties were. Section 92 itself recognised the distinction between a term of the contract and the contracting parties.

17. In the present case, the defence in effect is that though the plaintiff was also shown as a party to the document, no interest in the property was intended to be conveyed to him and no interest was in fact conveyed, which means that the plaintiff was shown only as a nominal party and not as a real party to the document. On the ratio of the decisions above referred to, this plea is clearly open to the defendant and the provisions of section 92 do not bar the defendant from raising such a contention.

18. It is therefore clear that the defendant is not prevented by section 92 from raising the contention that no part of the consideration was paid by the plaintiff, that his name was included only on a certain understanding nominally and that therefore the defendant is the absolute owner of the entire property.

18. The learned Counsel for the respondent also submitted that this plea was also open to him under section 82 of the Trust Act.

That section reads :

> " Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

19. In this case, the finding of the Courts below is that the defendant borrowed the sum of Rs. 3,000 and therefore the entire consideration paid under the document was that of the defendant. There is no evidence to show that the defendant intended to benefit the plaintiff in any way by impleading him as a purchaser. The plaintiff shall be deemed to be therefore holding the property if at all, for the benefit of the defendant who paid the consideration. The plaintiff is therefore not entitled to claim partition and separate possession of one half of the properties. This position is clear if we put this case with reference to an illustration. Suppose instead of purchasing the property in the name of the plaintiff and the defendant, the defendant had purchased the property in the name of the plaintiff and provided the entire consideration, would it not be open to the defendant to contend that the plaintiff was a benamidar and he was holding the property in trust for him and that therefore he was not entitled to claim any interest in the property? Certainly such a plea is open to him and it is not the contention of the appellant that such a plea would be barred under section 92 of the Evidence Act. In the instant case, the claim of the defendant is the same if we take it that it relates to the one half share in the suit property claimed by the plaintiff. With reference to one half-share, the case of the defendant is that he is the owner and it is not in dispute. With respect to the other half-share it is the case of the defendant that the plaintiff was a benamidar, the real owner being the defendant, he having provided

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1. A.I.R. 1965 Pat. 463.

the consideration for the same and not intending to benefit the plaintiff. Therefore he is entitled to retain the entire property for himself. Even on this ground, therefore, the defendant-respondent is entitled to succeed in defeating the plaintiff's claim in the suit.

20. The second appeal accordingly fails and it is dismissed with costs. No leave.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. V. Raghavan, J.*

Kora Miah Saheb .. *Appellant**

v.

Velayudha Konar and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 92—*Suit on mortgage by second mortgagee—First mortgagee not made party—Final decree—Petition for sale in execution subject to first mortgage—Petition dismissed for want of bidders—Mortgagor adjudged insolvent in the meanwhile—Second execution petition acknowledging liability under first mortgage—Official Receiver not made party—Petition dismissed as final decree was not in consonance with preliminary decree—Final decree amended—Validity—Fresh execution petition—Second mortgage-decreeholder purchasing hypotheca—Part-satisfaction entered Pays off first mortgagee—Right to subrogation.*

Where, in between the passing of a final decree in a suit by a second mortgagee on his mortgage to which the first mortgagee was not made a party and an infructuous petition for sale in execution the mortgagor was adjudicated insolvent and a second execution petition containing *inter alia* an acknowledgment of liability under the first mortgage taken out without the Official Receiver being made a party was also dismissed on the ground that the final decree was not in consonance with the preliminary decree, and thereafter the final decree was amended, the fact that no notice was given to the Official Receiver when the amendment was ordered does not make the amendment illegal. The rights of the secured creditors are outside the pale of the insolvency law and therefore there was no need to issue notice to the Official Receiver [*Para.* 13.]

The second mortgagee-decree-holder is in the position of a mortgagor *vis-a-vis* the first mortgage and an acknowledgment of liability made by him will be deemed to be an acknowledgment by the mortgagor. [*Para.* 15]

Subrogation is conventional when there is an agreement, express or implied that the person making payment shall exercise the rights and powers of the original creditor. Legal subrogation arises when a person who has in the property an interest of his own to protect, discharges a prior incumbrance. Subrogation by operation of law rests on the same principle as that in section 69, Contract Act. The distinguishing feature of subrogation is that the encumbrance that is paid off is not extinguished but is treated as kept alive and assigned to the person making the payment. [*Para.* 16.]

Where a second mortgagee filed a suit without impleading the first mortgagee, obtained a decree, brought the hypotheca to sale, purchased it himself and entered part-satisfaction of the decree and paid off the first mortgagee which had not become barred by limitation on the date when the second mortgagee redeemed his mortgage, he can claim subrogation and step into the shoes of the first mortgagee. [*Paras.* 17 *and* 18.]

Cases referred to :—

Nallathambi Nadar Chellakannu Nadar v. *Ammal Nadachi Chellathankam Nadachi and others*, I.L.R. (1963) Mad. 1003: (1964) 1 M.L.J. 181 : A.I.R. 1964 Mad. 169; *Mosa Devadasan* v. *Kali Kunji and others*, (1963) 2 M.L.J. 75 : A.I.R. 1962 Mad. 413; *Mt. Azizunnissa* v. *Komal Singh and others*, A.I.R. 1930 Pat. 579.

Appeal against the decree of the District Court of Tirunelveli in Appeal Suit No. 7 of 1967 preferred against the decree of the Court of the Subordinate Judge (Additional) of Tirunelveli in Original Suit No. 53 of 1963.

* S.A. No. 1369 of 1970. *21st March*, 1973.

V. C. Veeraraghavan, for Appellant.

A. Sundaram Iyer, for Respondent.

The Court delivered the following

JUDGMENT.—* * * Before dealing with the points raised I shall now state the real controversy between the parties. Defendants 1 and 2 are the original owners of the suit property. On 5th May, 1946, (Exhibit A-2) they executed an othi in favour of Palavesa Konar. On 1st May, 1949 (Exhibit A-3) the second defendant executed a sale in favour of the first defendant reserving a right of residence in favour of himself and his wife. On 15th June, 1949, the first defendant executed a second mortgage in favour of Gurunatha Konar for Rs. 2,000. On 26th December, 1949, the first defendant executed a third mortgage for Rs. 3,000 in favour of the first mortgagee. On 12th September, 1961 (Exhibit A-12) the first defendant executed a fourth mortgage for Rs. 2,000 in favour of one Kuppammal, which the mortgagee assigned to the fourth defendant. A fifth mortgage was created by the first defendant in favour of a chit fund for Rs. 3,000 and a sixth mortgage was executed by the first defendant in favour of Muthammal, the sixth defendant, for Rs. 1,000. The third mortgagee's rights under Exhibit A-4 were assigned to the 8th defendant on 28th June, 1963. The result is that over the suit property on the date of the suit the following persons held rights.

"(1) The first mortgage to Palavesa Konar.

(2) The second mortgage to the plaintiff—assignee from the 8th defendant.

(3) The third mortgage to the 8th defendant (assignee)

(4) The fourth mortgage to the fourth defendant (assignee).

(5) The fifth mortgage to the fifth defendant; and

(6) The sixth mortgage to the sixth defendant."

The plaintiff, who was the assignee of the second mortgagee's interest, filed O.S. No. 209 of 1955 on the file of the District Munsiff's Court, Tirunelveli. To that suit all the subsequent mortgagees were impleaded as parties as also the first defendant the mortgagor. Palavesa Konar, who was the first mortgagee, was, however, impleaded as the third defendant not in his capacity as the first mortgagee but in his capacity as third mortgagee only, which mortgage right the third mortgagee assigned to the 8th defendant under Exhibit B-1 dated 28th June, 1962. On 26th March, 1956, a preliminary decree for sale was passed which was followed by the final decree dated 22nd October, 1956. Meanwhile the first defendant-mortgagor was adjudicated an insolvent. It may be noted that the secured creditors' rights were not affected by the said insolvency proceedings and the final decree in O.S. No. 209 of 1955 was executed after amendment of the decree. Meanwhile on 3rd April, 1961, one Kuppammal purchased the suit property from the Official Receiver. In the Court auction sale held on 15th September, 1961, the plaintiff-decree holder purchased the hypotheca for Rs. 4,005 subject to the first mortgage, Exhibit A-2. A sale certificate was issued in favour of the purchaser and the plaintiff took delivery of possession on 7th December, 1961, and part satisfaction of the decree was recorded for Rs. 3,904, although the sale was brought for recovery of Rs. 4,933-6-6. In regard to the Official Receiver's sale to Kuppammal one Siva Sankaran claimed to be the real owner and his claim was upheld. Regarding possession certain suits were filed, which do not have any material bearing on the controversy in dispute. The plaintiff who, as already stated, was the purchaser in the second mortgagee's suit for sale, paid Rs. 6,000 to the legal representatives of the first mortgagee, Palavesa Konar, and obtained a release of the mortgagee's right in his mortgage (Exhibit A-11 dated 14th February, 1962). Sivasankaran who established his right as against Kuppammal also sold his interest to the plaintiff under Exhibit B-8 dated 18th October, 1962. The plaintiff has filed the present suit on the first mortgage (Exhibit A-2 dated 5th May, 1946).

12. The learned Counsel for the appellant contends:

(1) That the suit is not maintainable as the plaintiff's remedy, if any, is only to work out his rights under the decree in O.S. No. 209 of 1955. (2) That the

first mortgage was not fully discharged by the plaintiff, who claimed to have paid only Rs. 6,000 at the time of Exhibit A-11 as against Rs. 6,900 due on that date. (3) That the suit mortgage became barred by limitation on 14th February, 1962, when Palavesa Konar's heirs were paid Rs. 6,000 and that the acknowledgment Exhibit B-4 cannot extend the period of limitation and (4) There can be no subrogation as the plaintiff was under no obligation to discharge the mortgage (Exhibit A-2) it having become time barred and further the plaintiff had no interest in the property, this mortgage having become merged in the decree and that there was no mesne mortgages between the one in his favour and the other under the original of Exhibit A-2 for protecting which alone he could redeem the later mentioned mortgage and claim subrogation.

13. On the first question there is no substance, as the final decree in O.S. No. 209 of 1965 was amended on 27th March, 1961 in I.A. No. 111 of 1961. The preliminary decree in O.S. No. 209 of 1955 appears to have been in form No. 10 and the amendment resulted in the decree being drafted in Form 5-A. It is no doubt true if the amendment had not been there the rights of the first mortgagee had to be worked out only in the prior suit. But by reason of the amendment the decree was only to the effect that it was subject to the first mortgage and nothing more. The learned Counsel, however, contends that no notice was given to the Official Receiver when the amendment was ordered and, therefore, the amendment is illegal and not binding on the appellant. It may be noted that the rights of secured creditors are outside the pale of the insolvency law and therefore there was no need to issue the notice to the Official Receiver.

14. On the second question the position appears to be as follows—Palavesa Konar was the mortgagee under Exhibit A-2. The period of redemption fixed under Exhibit A-2 was two years and the redemption period expired on 5th May, 1948. Palavesa Konar died on 24th March, 1959, that is, after the institution of O.S. No. 209 of 1955 and Palavesa Konar was impleaded as a party in O.S. No. 209 of 1955. The mortgagees were content to receive Rs. 6,000 as against Rs. 6,900 due to them and it is not open to the appellant in the present appeal to contend that the entire amount due has not been paid.

15. On the third question Sri V. C. Veeraraghavan, contends that the acknowledgment of the mortgagee in E.P. No. 32 of 1960 cannot extend the period of limitation for enforcing the first mortgage. On the other hand, Mr. Sundara-Iyer the learned Counsel for the respondents contends that the decree holder-mortgagee under the second mortgage will be in the position of a mortgagor so far as the first mortgage is concerned, he being the person who is entitled to redeem the first mortgage and therefore the acknowledgment by him on 16th December, 1969 in E.P. No. 32 of 1960 would give a fresh cause of action. Mr. Veeraraghavan referred to the decision of the Full Bench in *Nallathambi Nadar Chellakannu Nadar* v. *Ammal Nadachi Chellathankam Nadachi and others*[1], That is a case under section 19 of the Limitation Act. In a suit for redemption brought by one co-mortgagor against another, who had earlier redeemed the mortgage and obtained possession of the mortgaged properties, the question referred to the the Full Bench was as follows: "Whether in order to constitute a valid acknowledgment of liability under section 19 of the Indian Limitation Act, it is essential that the person acknowledging should be under a liability in regard to the right in dispute at the time when he made the acknowledgment or whether it would be sufficient if he were liable at the time of the suit or an application in respect of that liability. In answering the reference Ramachandra Iyer, C.J. who delivered the leading judgment observed at page 171 as follows:

> "An acknowledgment of liability, as we have indicated above, presupposes that the person acknowledging possesses some interest which can be bound by his statement. If he has no such interest, it will be a misnomer to call his statement, as acknowledgment of liability. No debor, for example, can be held to be bound by a mere acknow-

1. I.L.R. (1963) Mad. 1003 : (1964) 1 M.L.J. 181: A.I.R. 1964 Mad. 169.

ledgment by a stranger. Again, it is a well-settled rule that an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a consciousness and an intention of continuing such relationship until it is lawfully terminated".

Relying upon the above observations the learned Counsel contended that in O.S No. 209 of 1955 the plaintiff was suing not as a mortgagor but as a mortgagee seeking to enforce a second mortgage and, therefore, his acknowledgment cannot extend the period of limitation.

The next decision referred to by the learned Counsel is *Mosa Devadasan* v. *Kali Kunji and others*[1], where Sadasivan, J., had occasion to consider a similar question. The headnote therein brings out correctly the conclusion of the learned Judge which runs as follows:

> "In order that an acknowledgment of mortgage liability may be valid and capable of extending the period of limitation, it must be proved that it was made by a person who was liable under the mortgage and that it was made when the mortgage was subsisting".

The question, therefore, for consideration is what was the character in which the acknowledgment was made in E.P. No. 32 of 1960. Mr. A. Sundaram Iyer, the learned Counsel for the respondents contends that the acknowledgment although made by the mortgagee-decree holder in E.P. No. 32 of 1960 must be deemed to be an acknowledgment by the mortgagor so far as the first mortgage is concerned in view of the fact that he will be entitled to redeem the first mortgage under section 91 of the Transfer of Property Act. There is considerable force in the contention of Mr. Sundaram Iyer.

16. The learned Counsel next referred to a series of decisions illustrating the principles of subrogation. Section 92 of the Transfer of Property Act deals with subrogation. Paragraph 1 of the section deals with subrogation by operation of law and the third paragraph deals with subrogation by agreement of parties. Subrogation means substitution, for the person redeeming is substituted for the encumbrancer whom he has paid off. Subrogation is conventional when there is an agreement, express or implied, that the person making the payment shall exercise the rights and powers of the original creditor. Legal subrogation arises when a person, who has in the property an interest of his own to protect, discharges a prior encumbrance. Subrogation by operation of law rests, therefore, on the same principle as in section 69 of the Indian Contract Act. The distinguishing feature of subrogation is that the encumbrance that is paid off is not extinguished but is treated as kept alive and assigned to the person making payment. Prior to the Transfer of Property Act subrogation of a puisne mortgagee paying off a prior mortgagee was determined under the rule of intention. According to the old section 74 of the Transfer of Property Act a puisne mortgagee redeeming a prior mortgagee was always subrogated. Under the present section 92 of the Transfer of Property Act the rights of the purchaser of the equity of redemption when he redeems are the same but they are stated mere simply and directly and the fiction of intention has been dispensed with. It is unnecessary to refer to cases of subrogation prior to the amendment of the Transfer of Property Act in 1929.

17. Subrogation may be legal or conventional. The distinction between the two being that in the case of the former the person having a pre-existing interest discharges the prior mortgage to protect his interest, whereas in the latter case he would be discharging only an obligation he had undertaken under a specific agreement. The foundation of the right of legal subrogation, with which we are now concerned in the present case, is the equitable principle of reimbursement. In the present case what has happened is that the second mortgagee filed a suit on his mortgage without impleading the first mortgagee, obtained a decree and brought the hypotheca to sale, purchased it himself and entered part satisfaction of the decree. A sum of money is still owing to him under the mortgage-decree. When such a person pays off a prior encumbrance, the question that arises

1. (1963) 2 M.L.J. 75 : A.I.R. 1962 Mad. 413.

is whether he can step into the shoes of the first mortgagee. I have already held that the first mortgagee's right to enforce his mortgage has not become barred by limitation on the date when the second mortgagee redeemed his mortgage.

18. The next question to be considered will be whether by reason of obtaining a decree on his mortgage the second mortgagee had disabled himself from redeeming the prior mortgage. In *Mt. Azizunnissa* v. *Komal Singh and others*[1], it was held that the purchaser of the mortgaged properties in execution of a mortgage decree, acquired not only the interest of the mortgagee but also the equity of redemption of the mortgagor, and that he is entitled to redeem other mortgages on the same property created by the mortgagor. Further in this case the second mortgage has not been wiped out by the passing of the decree, but that there is still due to him as second mortgagee a sum of Rs. 1,033-6-6 on the date of entering into part satisfaction of the decree. In my view, this is sufficient interest in the mortgagee entitling him to redeem the prior mortgage over the property. This being a case of legal subrogation, I am of opinion that the second mortgagee rightly stepped into the shoes of the first mortgagee and the present suit is, therefore, maintainable. I may, in this connection, refer to another aspect of the matter. O.S. No. 53 of 1963, out of which the above appeal has arisen, was heard along with C.M.A. No. 30 of 1965 and disposed of by a common judgment by the Subordinate Judge of Tirunelveli. The Court auction sale held in execution of the decree in O.S. No. 209 of 1955, was sought to be set aside in E.A. No. 1289 of 1963 on the ground that the sale was void as it was held without impleading the Official Receiver to represent the estate of the first defendant, as also for the reason that the execution proceedings are void as against the Official Receiver, as also for cancellation of the part satisfaction of the decree. That application was allowed by the District Munsif, C.M.A. No. 30 of 1965 was filed against the said order which was heard along with the suit and the judgment of the trial Court was confirmed. There was a further appeal to this Court, in C.M.S.A. No. 153 of 1966 and Venkataraman, J., allowed the appeal and set aside the order of the Courts below. The result is that the sale held on 15th September, 1961 was held not to be a nullity. The judgment of Venkataraman, J., and the decree in C.M.S.A. were admitted as additional evidence in the Courts below. In my view the judgment of the High Court referred to above has no material bearing in considering the questions in controversy in the appeal. The result is that the plaintiff is entitled to be subrogated to the rights of the first mortgagee under Exhibit A-2 and that the said mortgage is not barred by limitation. Further the plaintiff has sufficient interest to claim subrogation for the reasons mentioned by me above and that the plaintiff did not give up his right to be subrogated to the rights of the mortgagee under Exhibit A-2 by reason of his obtaining Exhibit A-11 and that the claim to subrogation has been rightly upheld by the Courts below.

1. A.I.R. 1930 Pat. 579.

19. In the result, the Second Appeal fails and is dismissed. There will be no order as to costs. Leave granted.

P.S.P. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Ramaprasada Rao, J.*

Chinnaswamy Thevar .. *Petitioner**

v.

Election Commissioner (District, Munsif), Periakulam and others .. *Respondents.*

Tamil Nadu Panchayat (Conduct of Election of President of Village Panchayat) Rules, (1970), *Rules* 14, 19 (2) (d)—*Village Panchayat—Election of President—Votes rejected—Marked on the back side—Not as required under the rules—Rejection whether valid—Constitution of India* (1950), *Article* 226.

The election and the process of election and the law relating to election are all creatures of the relevant provisions of statute, and the Courts cannot, for con-

* W.P. No. 1217 of 1971.

13th December, 1972.

venience or in the name of equity, substitute its own process for the procedure clearly set and defined under the particular Act or the rules governing the election. [*Para.* 4.]

Where the face of the ballot paper is ignored and the back of it is adopted as the base for marking, then it is not a case where a doubt has crept on the record of the ballot paper for the appropriate authority to undertake an investigation as to the mind of the voter. [*Para.* 4.]

If there is a purposeful departure from the normal prescription as to the mode of voting, in the absence of any explanation by the person concerned about such an infraction, it follows that the ballot paper is one which has not been marked in accordance with the defined and well settled prescriptions governing the elections and, therefore, is one which has to be rejected *in limine.* [*Para.* 4.]

Cases referred to :—

Kisan v. *Amikumar*, A.I.R. 1969 Bom. 213; *Dhanpat Lal* v. *Harisingh*, A.I.R. 1969 Raj. 92.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Election O.P. No. 29 of 1970 on the file of the first respondent Election Commissioner-*cum*-District Munsif, Periyakulam and quash the proceedings therein in E.O.P. No. 29 of 1970 and dated 24th March, 1971 as illegal.

R. S. Venkatachari, *V. Muthuperumal* and *R. Dasarathan*, for Petitioner.

T. Sathiadev, Assistant Government Pleader, for Respondent No. 1.

R. Balasubramanian, for second Respondent.

The Court made the following

ORDER.—In an election held for choosing the President of Mathalakkampatti Village Panchayat, the petitioner succeeded on the basis of the counting of votes made by the Returning Officer. According to the return, the petitioner obtained 496 votes, the contesting respondent 494 votes. The contesting respondent took up the matter before the election authority, which is the District Munsif of Periakulam who, after having been satisfied that there was considerable doubt about the propriety of the counting of the votes, directed a recount of the same. On such recount undertaken at the instance of the election authority, but in the presence of the parties, it was found that the petitioner secured 495 votes as against 496 votes obtained by the contesting respondent. The election authority, on the basis of such recount, declared the contesting respondent as having been duly elected and set aside the election of the petitioner. It is as against this, the present writ petition has been filed.

2. Various contentions were raised before the election authority. But the only ground on which the order is challenged is founded on the decision of the Election Court which rejected two votes marked for the petitioner. The election authority found and such a factual finding is not disputed that the two ballot papers in question bearing Nos. 863611 and 863585 contained marks on the backside, that they were not markings as required under the rules and that they did not contain any marking in the columns reserved for marking. In those circumstances, the election authority rejected the two votes. It is this decision of the lower authority that is challenged here.

3. Before adverting to the contentions, the relevant rules regarding the election in question may be briefly noticed. Under rule 14 of the Tamil Nadu Panchayat (Conduct of Election of President of Village Panchayat) Rules, 1970, a procedure is prescribed in the matter of issue of ballot papers and the voting by the voters. Sub-rule (2) of rule 14 therein says that the elector, on receipt of the ballot paper, shall forthwith proceed to the voting compartment, and there, with the aid of the instrument supplied for the purpose, make a mark on the ballot paper against the symbol of the candidate for whom he intends to vote and that the mark may be made anywhere in the compartment within which the symbol of such candidate is printed on the *ballot paper.* Rule 19 (2) (*d*) says that a ballot paper shall

be rejected if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given.

4. I have already adverted to the finding of the Election Court that the marking was on the reverse side of the ballot paper. That such a marking is not warranted under the rules is not disputed before me. But what is said is that in view of the prevalence of illiteracy in our country such a haphazard but a purposeful marking, though on the back of the ballot paper, but on the symbol which is visible even on its reverse, would amount to substantial satisfaction of the requirement of the rule in that the intention of the voter can easily be gathered and it cannot be said that in such circumstances there could be a doubt in the mind of any one concerned with the counting of such a vote that the voter did not exercise his vote in favour of the particular symbol or person. Though the argument is attractive, yet, it has to fail for the reason that the election and the process of election and the law relating to election are all creatures of the relevant provisions of statute, and the Courts cannot, for convenience or in the name of equity, substitute its own process for the procedure clearly set and defined under the particular Act of the rules governing the election. In the instant case under rule 14, the mode of voting has been clearly defined. As against the symbol or the name of the particular candidate, a compartment is provided. The voter is expected to mark within the compartment or as against the symbol the name. Even then he should keep within the periphery of the compartment. If, however, by accident he traversed beyond the border of the said compartment, but makes a mark on the face of the ballot paper, it is only in such a situation the scope for investigation as to the mind of the voter would arise. But in my view, such an investigation need not be undertaken in a case where the voter ignores the face of the ballot paper, but attempts to imprint the mark on the reverse or the back side of the ballot paper, which is quite opposite to the intent and directions prescribed in the rules governing the election. As a matter of fact, Lord Halsbury, in Halsbury's Laws of England, third edition, volume 14, at page 140 observes:—

> "A ballot paper marked on the back only should not be counted, even though the mark shows through the paper on to the front".

The Law Lord has made it almost axiomatic that any attempt to mark a ballot paper on its reverse or on the back would not show or establish the intention of the voter and it would be idle to speculate upon such intentions if such were the facts. This is not a case where it could be said reasonably that a doubt is entertainable by the Courts scrutinising the ballot paper as to whether the voter exercised his franchise in favour of one or the other of the contesting candidates. That situation will arise if the voter made the mark on the front of the ballot paper at or near the compartment or as against the symbol or near it and under such similar circumstances. But where the face of the ballot paper is ignored and the back of it is adopted as the base for marking, then, it is not a case where a doubt has crept on the record of the ballot paper for the appropriate authority to undertake an investigation as to the mind of the voter. As a matter of fact, the Bombay High Court in *Kisan* v. *Anikumar*,[1] whilst considering a similar rule under the Maharashtra Municipalities Act and the rules framed for purposes of municipal election thereunder, categorically stated:

> "The intention of the rule is very clear in our opinion, and does not permit any infraction in its observance. The ballot paper is intended to be used as such by making a mark with the instrument supplied on the face of the ballot paper and not on the reverse".

I would add that if there is a purposeful departure from the normal prescriptions as to the mode of voting, in the absence of any explanation by the person concerned about such an infraction, then it follows that the ballot paper is one which has not been marked in accordance with the defined and well settled prescriptions governing the elections and, therefore, is one which has to be rejected *in limine*. The Rajasthan High Court in *Dhanpat Lal* v. *Harisingh*[2], while considering

1. A.I.R. 1969 Bom. 213 at 218.
2. A.I.R. 1969 Raj. 92.

a more or less similar situation, took a different view. But on a further probe into the facts governing the case, I find that the manner of casting votes, which were governing the situation in that case, is different from rule 14 (2) of our Rules. Rule 30 of the Rules in the Rajasthan case, does not provide for the marking within the compartment provided for on the face of the ballot paper. It was in those circumstances, the learned Judges of that Court observed that where a ballot paper, which is translucent and the lines demarcating the compartments and symbols are clearly visible on the back side, is marked on the reverse by the voter, the paper is valid under rule 30 of the Rajasthan Panchayat and Nyaya Panchayat Election Rules. That case is distinguishable because of the peculiar facts with which the learned Judges were faced. I agree with the dicta laid down by the Bombay High Court, which was considering a similar rule as that which is being interpreted by me. For the reasons stated above and as there is no error apparent or any error of jurisdiction in the order of the Election Court, this writ petition is dismissed. There will be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Nabisha Begum .. *Appellant**

v.

Arumuga Thevar and others .. *Respondents.*

(A) *Hindu Law—Joint family—Separation—Unequivocal intention—Declaration and communication to other coparceners—Suit for partition—Institution of suit is declaration—Suit by coparcener* sui juris *and suit on behalf of minor—No distinction—Suit by minor—Declaration—Subject to approval by Court.*

In a suit for partition of the joint family properties instituted on behalf of a minor coparcener against his other two brothers and the mother, a preliminary decree was passed specifying the shares. Before any one applied for passing of a final decree, the minor plaintiff attained majority and he filed an application under Order 32, rule 12, Civil Procedure Code, electing to abandon the suit. An order dismissing the suit was passed. Subsequently he died and one of his brothers was not heard of for a long time. Then the mother filed an application under that suit for a final decree allotting 2/3rd share to her and 1/3rd share to the remaining parcener. The application was dismissed. In the meanwhile, the other coparcener claiming the entire properties as the sole surviving coparcener sold the same to the appellant who filed the suit for possession against the mother. The two lower Courts and the High Court in second appeal dismissed the same holding that a suit for general partition and allotment of the alienating coparcener's share should have been filed. The plaintiff appealed.

Held: It is settled law that division in status amongst members of a joint family takes place immediately on a coparcener declaring his unequivocal intention to separate and communicating the declaration to the other members. The very filing of a suit for partition would amount to such declaration. In this regard, there is no distinction between a coparcener who is *sui juris* and a coparcener who is a minor and on whose behalf a next friend acts, except that such a declaration is subject to approval by the Court. [*Para.* 6.]

(*B*) *Civil Procedure Code* (*V of* 1908), *Order* 32, *rule* 12*—Hindu Law—Suit for partition of joint family properties by minor—Preliminary decree passed—Minor attaining majority electing to abandon suit—Dismissal of suit—Division in status—Benefit to minor—Shares not affected by dismissal—Preliminary decree—No question of becoming* non est*—Division in status—To date back to date of plaint.*

There is no question of a preliminary decree passed in a suit for partition between coparceners becoming *non est* as a result of the suit being dismissed under Order 32, rule 12, Civil Procedure Code. An order of dismissal made by the Court on the erstwhile minor plaintiff abandoning the suit under Order 32, rule 12, Civil Procedure Code, would only mean that all reliefs which had not been granted

* L.P.A. No. 110 of 1965.

5th February, 1973

so far are negatived. It would certainly not mean that a decree which has already been passed granting certain reliefs is either set aside or becomes *non est.* A preliminary decree is as much a decree as a final decree and as to the rights of parties conclusively determined by a preliminary decree, there is no going back unless the decree is set aside by some mode known to law. Order 32, rule 12, Civil Procedure Code, is not meant for setting aside a decree already passed. [*Paras.* 7, 8.]

After the passing of the preliminary decree, there would be no joint family status between the members and the division in status would date back to the date of the plaint. [*Para.* 6.]

It is no doubt true that a suit for partition would be completely disposed of only after a final decree is passed. One of the questions that call for determination in a suit for partition of joint family properties instituted on behalf of a minor is whether it was beneficial for the minor. When the Court passes a preliminary decree, this question is finally decided. The question as to what share the respective parties are entitled to is also finally decided by the Court when it passes a preliminary decree. Therefore if the suit for partition is said to be pending, it was pending only for the determination of the remaining questions and not with regard to questions which have already been decided which decision merges into the preliminary decree. [*Para.* 9.]

A unilateral declaration of intention to divide by a member which is unequivocal and which is communicated to the co-parceners brings about a disruption or division of the status of a family and when once such a communication of intention is made which has resulted in the severance of status, it is not open to the members concerned to nullify its effect so as to restore the family to its original joint status. There can be no distinction between declaration made by a coparcener who is *sui juris* and a declaration made by a next friend of a minor coparcener which has subsequently been approved by the Court in passing the preliminary decree. [*Para.* 11.]

(*C*) *Hindu Law—Joint family—Coparceners—Declaration of intention to separate—Division in status—Withdrawal of declaration—Does not amount to agreement to reunite.*

Withdrawal of the unilateral act or declaration of intention to separate which has already resulted in division in status cannot amount to agreement to reunite. [*Para.* 11.]

(*D*) *Civil Procedure Code* (*V of* 1908), *Order* 32, *rule* 12—*Hindu Law—Joint family—Suit for partition by a minor—Minor attaining majority before passing of preliminary decree, electing to abandon suit—Legal effect on status of family.*

In a suit for partition where the preliminary decree itself has not been passed, the position is that though the next friend, in filing the suit for partition, has made an unequivocal declaration on behalf of the minor to separate, that declaration would not become an effective declaration because the law says that such a declaration is subject to approval by the Court. Till a preliminary decree is passed, the stage of the Court approving or disapproving the declaration made by the next friend of the minor would not arise. In such a case, when the minor on attaining majority, abandons the suit, the position would be similar to a case where the Court holds that it is not in the interests of the minor to separate and refuses to grant a preliminary decree. [*Para.* 10.]

Cases referred to :—

Podasubhayya v. *Akkamma*, 1959 S.C.J. 138 : (1959) S.C.R. 1249 : (1959) 1 An.W.R. (S.C.) 60 : (1959) 1 M.L.J. (S.C.) 60: A.I R. 1958 S.C. 1042; *Ramaswamy Chettiar* v. *Roya Kuppa Chetty*, I.L.R. (1962) Mad. 77 : (1962) 1 M.L.J. 174: A.I.R. 1962 Mad. 81 ; *Venkata Reddy* v. *Pothi Reddy*, (1963) 2 S.C.J. 77: (1963) 2 M.L.J. (S.C.) 126: (1963) 2 An.W.R. (S.C.) 126: A.I.R. 1963 S.C. 992; *Rama Rao* v. *Venkata Subbayya*, A.I.R. 1937 Mad. 274; *Radhakrishna* v. *Satyanarayana*, I.L.R. (1949) Mad. 229 : (1948) 2 M.L.J. 331: A.I.R. 1949 Mad. 173; *Puttarangamma* v. *Ranganna*, (1968) 3 S.C.R. 119 : (1968) 2 S.C.J. 668; A.I.R. 1968 S.C. 1018.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramakrishnan, dated 17th

December, 1964 and made in S.A. No. 200461 appeal against the decree of the District Court, Tirunelveli, and passed in A.S. No. 345 of 1960. (O.S. No. 40 of 1960) District Munsif's Court, Tirunelveli.

Thyagarajan, for Appellant.

K. Parasurama Iyer for *R. Srinivasan*, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—The plaintiff, who lost before the trial Court, the first appellate Court as well as before Ramakrishnan, J., in second appeal, is the appellant before us in this Letters Patent Appeal. The suit is one for declaration and possession with future mesne profits in respect of certain lands which the plaintiff purchased from one Velayutham Pillai under the sale deed Exhibit A-1 dated 25th July, 1957. All the Courts have held that the plaintiff's remedy, if any, is only a suit for general partition with an equity for having the suit properties allotted to the share of his vendor Velayutham Pillai inasmuch as, on the date of sale, he was not the owner of the suit properties but only had a 1/3 share in the family properties including the suit properties and that the suit for possession of the specific properties should fail. The matter turns upon the effect of an order under Order 32, rule 12 of the Code of Civil Procedure, in a suit for partition in which a preliminary decree has already been passed, regarding the status of the members of the joint family. Whether the division in joint family status already brought about is nullified and the members restored to their status of joint family members by the order under Order 32, rule 12, Code of Civil Procedure, dismissing the suit (even though a preliminary decree for partition had already been passed), is the question.

2. The facts are these: Velayutham Pillai, the vendor under Exhibit A-1 in favour of the plaintiff, one Ambalavana Pillai and one Nellaiappa Pillai are the sons of one Muthiah Pillai. The father Muthiah Pillai died in the year 1933. The three brothers admittedly were members of a joint Hindu family and the family owned several items of immovable properties. In 1941, when Nellaiappa Pillai, one of the three brothers, was a minor, O.S. No. 35 of 1941 was filed on the file of the Court of the Subordinate Judge, Tirunelveli, on behalf of the said minor Nellaiappa Pillai by his uncle acting as his next friend. To this suit, the other two brothers, *viz.*, Velayutham Pillai and Ambalavana Pillai, as well as Kanthimathi Ammal, the mother of the parties, had been impleaded as defendants. A preliminary decree for partition declaring that the minor plaintiff, *viz.*, Nellaiappa Pillai, and the other two brothers, Velayutham Pillai and Ambalavana Pillai, are each entitled to a 1/3 share in the various items of suit properties was passed. The preliminary decree also made certain provision towards the maintenance of Kanthimathi Ammal, the mother of the parties. After the passing of the abovesaid preliminary decree but before any one applied for passing a final decree, Nellaiappa Pillai, the minor plaintiff in the suit, attained majority. Then he filed I.A. No. 110 of 1944 in O.S. No. 35 of 1941 under Order 32, rule 12, Code of Civil Procedure, electing to abandon the suit. Upon that, the Court appears to have passed an order dismissing the suit. The said Nellaiappa Pillai died in April, 1945 leaving no widow or issue.

3. Very many years later (*i.e.*), in the year 1957, Kanthimathi Ammal, the mother of the parties, filed I.A. No. 278 of 1957 in the abovesaid suit for having the suit restored to file. By that time, Ambalavana Pillai, one of the three brothers was not heard of for several years. It is stated that his whereabouts are not known since 1948. In I.A. No. 278 of 1957, Kanthimathi Ammal pleaded that on the death of Nellaiappa Pillai in 1945 and on the civil death of Ambalavana Pillai who is not heard of for a long number of years, their two shares had devolved on her and that the suit should be restored to file and a final decree passed giving her 2/3 share in the property, while the remaining 1/3 share should go to the only remaining son, Velayutham Pillai. This application, which was resisted by Velayutham Pillai, ultimately came to be dismissed mainly on the ground that the order in I.A. No. 110 of 1944, the application under Order 32, rule 12, Code of Civil Procedure, dismissing the suit had been

passed in the presence of Kanthimathi Ammal, that she having been a party to the said proceedings, cannot now be heard to say that the suit should be restored especially after the lapse of 12 or 13 years. The question whether there had been division in status between the three brothers, Velayutham Pillai, Ambalavana Pillai and Nellaiappa Pillai, and whether, on the death of Nellaippa Pillai and on the civil death of Ambalavana Pillai, their respective shares devolved on Kanthimathi Ammal, their mother, was not decided in I.A. No. 278 of 1957. That application was dismissed as aforesaid on 5th December, 1958. It was in the meanwhile Velayutham Pillai executed Exhibit A-1 dated 25th July, 1957, in favour of the appellant before us.

4. The plaintiff brought the suit O.S. No. 40 of 1960 on the file of the Court of the Distirct Munsif, Tirunelveli, out of which the present appeal arises, *inter alia* contending that there had been no division in the joint family status between the three brothers, Velayutham Pillai, Ambalavana Pillai and Nellaiappa Pillai, and on the death of Nellaiappa Pillai and on the civil death of Ambalavana Pillai, Velayutham Pillai got all the joint family properties by survivorship and that therefore he was entitled to convey good title to her in respect of the suit properties by executing Exhibit A-1 dated 25th July, 1957. The main contesting defendant is Kanthimathi Ammal who has been impleaded as the 4th defendant in the suit. The other three defendants (defendants 1 to 3) are the tenants under Kanthimathi Ammal. Several questions had been raised before the trial Court, with which we are not now concerned; the trial Court as well as the first appellate Court held that Velayutham Pillai, the plaintiff's vendor, did not get all the joint family properties by survivorship as there had been division in status amongst the three brothers and that the shares of Nellaiappa Pillai and Ambalavana Pillai had devolved on Kanthimathi Ammal, the mother, as she is the nearest heir. Before Ramakrishnan, J., who heard the second appeal, two questions were urged, one regarding the effect of the order in I.A. No. 110 of 1944 filed by Nellaiappa Pillai under Order 32, rule 12, Code of Civil Procedure and the second was regarding the effect of the order dismissing I.A.No. 278 of 1957, the application filed by Kanthimathi Ammal, for having O.S. No. 35 of 1941 restored and a final decree passed therein. Regarding the second point, the contention had been that Kanthimathi Ammal is barred by the principles of *res judicata* from contending in the present suit that she become entitled to the shares of Nellaiappa Pillai and Ambalavana Pillai inasmuch as her application to restore O.S.No. 35 of 1941 had been dismissed. But this question of *res judicata* does not really arise because, as already seen, the Court which dismissed I.A. No. 278 of 1957 did not decide the question of the division in status or otherwise between the three brothers and whether the shares of Nellaiappa and Ambalavana devolved on their mother Kanthimathi Ammal or not. That question is not agitated before us. The only point that is raised, as we said earlier, is about the effect of the order passed in I.A.No. 110 of 1964 in O.S. No. 35 of 1941.

5. The contention of the learned Counsel for the appellant is that as O.S.No. 35 of 1941, the suit for partition, came to be dismissed on Nellaiappa filing I.A.No. 110 of 1944 under Order 32, rule 12 of the Code of Civil Procedure after he attained majority, the parties got restored to their original position *viz.*, that before filing of O.S. No. 35 of 1941, and that therefore Nellaiappa and Ambalavana cannot be considered to be divided members when the former died and the latter is civilly dead. But this contention is wholly unacceptable.

6. It is settled law that division in status amongst members of a joint family takes place immediately on a coparcener declaring his unequivocal intention to separate and communicates the declaration to the other members. The very filing of a suit for partition would amount to such a declaration. In this regard, there is no distinction between a coparcener who is *sui juris* and a coparcener who is a minor and on whose behalf a next friend acts, except that such declaration is subject to the approval by Court. In *Podasubhayya* v. *Akkamma*[1], their Lordships of the Supreme Court observe:—

1. 1959 S.C.J. 138 : (1959) S.C.R. 1249 : (1959) 1 An.W.R. (S.C.) 60 : (1959) 1 M.L.J. (S.C.) 60 : A.I.R. 1958 S.C. 1042 at 1047.

"Now, the Hindu Law makes no distinction between a major coparcener and a minor coparcener, so far as their rights to joint properties are concerned. A minor is, equally with a major, entitled to be suitably maintained out of the family properties, and at partition, his rights are precisely these of a major. Consistently with this position, it has long been settled that a suit for partition on behalf of a minor coparcener is maintainable in the same manner as one filed by an adult coparcener, with this difference that when the plaintiff is a minor the Court has to be satisfied that the action has been instituted for his benefit".

Then at page 1049, their Lordships observe:—

"In our judgment, when the law permits a person interested in a minor to act on his behalf, any declaration to become divided made by him on behalf of the minor must be held to result in severance in status, subject only to the Court deciding whether it is beneficial to the minor; and a suit instituted on his behalf, if found to be beneficial, must be held to bring about a division in status".

The above decision has been followed and the point stressed by a Division Bench of this Court in *Ramaswamy Chettiar* v. *Roya Kuppa Chetty*[1], and it is enough to quote the relevant part in the head note:

"It is now well-settled that under the Hindu Law there is no distinction between a major coparcener and a minor coparcener so far as their rights in the joint family properties are concerned. As any other coparcener a minor coparcener too has a right, by a unilateral declaration on his part, to effect a division on status in the family so far as he is concerned, without effecting an actual partition. But as a minor cannot be held to have a volition of his own, a guardian or next friend acting on behalf of the minor is allowed to exercise such a volition subject to the condition that it is approved by the Court as a safeguard to the minor's interest."

1. (1962) 1 M.L.J. 174 : I.L.R. (1962) Mad. 77 : A.I.R. 1962 Mad. 81.

In the present case, undoubtedly Nellaiappa Pillai, who was then a minor, acting through his next friend filed the suit for partition, *viz.*, O.S. No. 35 of 1941, and ultimately the Court passed a preliminary decree in August, 1942 by which the shares of the parties in the properties came to be declared. Admittedly the preliminary decree declared that each of the three brothers, *viz.*, Nellaiappa Pillai (the minor plaintiff is the suit), Velayutham Pillai and Ambalavana Pillai (defendants in the suit) is entitled to a 1/3 share in the family properties. This is on the Court's finding that it was beneficial for the minor to be divided from his brothers. That means, the Court has put its seal of approval to the declaration made by the next friend on behalf of the minor plaintiff. Undoubtedly, after the passing of the preliminary decree, there was no joint family status between the three brothers and the division in status dates back to the date of plaint. As a matter of fact, the learned Counsel appearing for the appellant does not dispute the above position. But his contention is that because of the subsequent events it must be deemed that the joint family status between the three brothers came to be restored.

7. The contention is that when the Court, in allowing I.A.No. 110 of 1944 filed by Nellaiappa under Order 32, rule 12, Code of Civil Procedure (on his attaining majority), dismissed O.S. No. 35 of 1941, the suit for partition, the parties got restored to their original position (*i.e.*), the position prior to the filing of the suit, as according to the learned Counsel, the dismissal of the suit wiped out all the earlier proceedings including the preliminary decree. This contention is untenable.

There is no question of the preliminary decree becoming *non est* as a result of the suit being dismissed under Order 32, rule 12, Code of Civil Procedure. We will quote the said rule:

"1. A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

2. Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend

and for leave to proceed in his own name.

3. The title of the suit or application shall in such case be corrected so as to read henceforth thus:

"*A, B*, late a minor, by *C,D*. his next friend, but now having attained majority."

4. Where he elects to abandon the suit or application he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

5. Any application under this Rule may be made *ex parte;* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend".

The order of dismissal made by the Court on the erstwhile minor plaintiff abandoning the suit under Order 32, rule 12, Code of Civil Procedure, would only mean that all reliefs which had not been granted so far are negatived. It would certainly not mean that a decree which has already been passed granting certain reliefs is either set aside or become *non est*. Supposing the suit filed on behalf of the minor plaintiff does not contemplate passing of a preliminary decree at one stage and passing of a final decree at a later stage and the suit has been decreed and there is nothing more to be done in the suit, there would be no question of such a decree being wiped out by the minor, on attaining majority, filing an application under Order 32, rule 12, Code of Civil Procedure. Even in the present case, if a final decree had been passed before the minor plaintiff attained majority, there would be no question of the suit being dismissed under Order 32, rule 12, having the effect of nullifying the decree. A decree once passed by a competent Court can be set aside only in appeal or other modes known to law. A suit, which has already been decreed, cannot be dismissed thereby nullifying the decree. There is no difference between a preliminary decree and a final decree in this regard.

8. Section 2, sub-section (2), of the Code of Civil Procedure defines "decree" as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final." Therefore a preliminary decree is as much a decree as a final decree and, as far as the rights of parties conclusively determined by a preliminary decree, there is no going back unless the decree is set aside by a some mode known to law. Surely Order 32, rule 12, Code of Civil Procedure, is not meant for setting aside a decree already passed. As we pointed out earlier, if in a suit, say for possession, decree has already been passed allowing the plaintiff's claim, the suit cannot be dismissed by the Court which passed the decree, under Order 32, rule 12, Code of Civil Procedure. That provision would apply only with regard to a matter which has not already fructified into a decree.

9. The learned Counsel contends that as long as a final decree has not been passed, the suit for partition should be deemed to be pending and as the suit has not been disposed of, the same can be effectively dismissed. It is no doubt true that a suit for partition would be completely disposed of only after a final decree is passed. Therefore, on the date on which I.A. No. 110 of 1944 was filed by Nellaiappa, the suit was no doubt pending on the file of the Court of the Subordinate Judge, Tirunelveli. But it should not be forgotten that the suit was not pending regarding all the questions that arose in the suit. The suit for partition having been filed by a minor coparcener through his next friend, one of the questions that fell for determination by the Court before passing of a preliminary decree was whether it was beneficial for the minor to separate from the other coparceners. That question has undoubtedly been finally decided by the Court when it passed the preliminary decree. The question as to what share the respective parties are entitled has also been finally decided by the Court when it passed the preliminary decree because admittedly the preliminary decree declares that each of the three brothers is entitled to 1/3rd share. The definition of the word "decree" makes it clear that a decree can be either preliminary or final and even a preliminary decree is one which

conclusively determines the rights of the parties with regard to certain matters in controversy in the suit. In *Venkata Reddy* v. *Pothi Reddy*[1], their Lordships of the Supreme Curt point out that a preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. Therefore, if the suit was pending, it was so pending only for the determination of the remaining questions and not with regard to questions which has already been decided, which decision had merged into the preliminary decree. The order in I.A. No. 110 of 1944 dismissing the suit would in no way affect the preliminary decree which has already been passed.

10. However, the learned Counsel for the appellant, relying on certain observations of Venkataramana Rao, J., in *Rama Rao* v. *Venkata Subbayya*[2], contends that by Nellaiappa electing to abandon the suit for partition as contemplated under Order 32, rule 12, Code of Civil Procedure he must be deemed to have revoked the intention to separate and therefore continued to be an undivided member of the family. That was a case where the minor plaintiff, on whose behalf the suit for partition had been filed, elected to continue the suit and the question which fell for determination by Venkataramana Rao, J., was whether the rights of the plaintiff are to be determined as on the date of the plaint or as on the date when he elected to continue the suit. In the course of the discussion, the learned Judge observed at page 276 (column 2) and page 277 (column 1):

> "The *ratio decidendi* of the Full Bench on the other hand is intelligible; the exercise of the option by the guardian does effect a severance but the severance so to speak remains in a state of suspended animation till the Court ratifies the act; the Court takes upon itself the task of deciding that which the minor if he were an adult would have done himself, namely whether it is beneficial or not to become separate; it is not a fresh expression of volition by the Court. The volition was already expressed by the guardian on behalf of the minor; the Court puts the seal of approval on it in the place of the minor and for him. It is open to the minor on attaining majority to elect to abandon or continue the suit. If he elects to continue, he adopts the act of the guardian and puts his own imprimatur on it and the Court is no longer called upon to pronounce its opinion on it; the minor becomes separated from the date of plaint. And if he elects to abandon the suit, the minor continues to be an undivided member of the family and he must be deemed to have revoked the intention to separate".

The learned Counsel for the appellant very much relies on the latter part of the above observation of Venkataramana Rao, J. Apart from the observation being in the nature of *obiter*, it certainly does not apply to a suit for partition, where a preliminary decree had already been passed. In a suit for partition where the preliminary decree itself has not been passed, the position is that though the next friend, in filing the suit for partition, has made an unequivocal declaration on behalf of the minor to separate, that declaration has not become an effective declaration because the law says that such declaration is subject to approval by the Court. Till a preliminary decree is passed, the stage of the Court approving or disapproving of the declaration made by the next friend on behalf of the minor would not arise. In such a case, when the minor, who has by then attained majority, abandons the suit, the position would be similar to a case where the Court holds (the minor plaintiff still continuing to be a minor even till the date of preliminary decree) that it is not in the interests of the minor to separate and refuses to grant a preliminary decree for partition. But that is not the position as far as the present case is concerned. Here the Court has, in fact, set its seal of approval of the declaration made by the next friend of the minor to separate and that decision of the Court has become final. Therefore the observations of Venkataramana Rao, J., relied on by the learned Counsel would not help him. In the present case, when Nellaiappa filed I.A.No. 110 of 1944, it would certainly have been open to the

1. (1963) 2 M.L.J. (S.C.) 126 : (1963) 2 S.C.J. 77 : (1963) 2 An.W.R. (S.C.) 126 : A.I.R. 1963 S.C. 992.
2. A.I.R. 1937 Mad. 274.

other sharers to press for a final decree. Needless to say that in a suit for partition there is no distinction between a plaintiff and a defendant who is also claiming a share. The preliminary decree had declared not only the share of Nellaiappa but also that of Velayutham Pillai and Ambalavana Pillai. By Nellaiappa, on attaining majority, saying that he was abandoning the suit, the rights of the other two sharers to have the properties divided by metes and bounds and getting a final decree in the same suit cannot be jeopardised.

11. There is also the further question as to whether a coparcener who made the necessary declaration and brought about a severance in status can unilaterally withdraw the declaration and restore the parties to their original position. In *Radhakrishna* v. *Satyanarayana*[1], a Division Bench of this Court points out that when once there is a division in a joint Hindu family, whether of status or property, there is no means of avoiding the result except by a reunion for which an agreement, express or implied, is always required. This decision also points out that a unilateral declaration of intention to divide by a member which is unequivocal and which is communicated to the other coparceners brings about a disruption or division of the status of a family and when once such a communication of intention is made, which has resulted in the severance of status, it is not open to the member concerned to nullify its effect so as to restore the family to its original joint status. It is further pointed out that the withdrawal of the unilateral act or declaration of intention to separate which had already resulted in a division in status cannot amount to an agreement to reunite. This decision has been referred to with approval by their Lordships of the Supreme Court in *Puttarangamma* v. *Ranganna*,[2]. It is pointed out by their Lordships of the Supreme Court at page 1022 that when once a communication of the intention to separate is made, which has resulted in the severance of the joint family status, it is not thereafter open to the coparcener to nullify its effect so as to restore the family to its original joint status, though it is possible for the members of the family by a subsequent agreement, to reunite. It is made clear that the mere withdrawal of the unilateral declaration of the intention to separate which already had resulted in the division in status cannot amount to an agreement to reunite. Regarding this aspect, there can be no distinction between a declaration made by a coparcener who is *sui juris* and a declaration made by the next friend of a minor coparcener which has subsequently been approved by Court in passing the preliminary decree.

12. The result is, the appeal fails and the same is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

The Union of India represented herein by the General Manager, Southern Railway, Madras-3 .. *Appellant**

v.

C. Kanniah *Respondent.*

(A) *Limitation Act* (*IX of* 1908), *Article* 102—*Railway servant—Suit for arrears of salary—Accrual from month to month—Dismissal from service—Order of dismissal void* ab initio—*Reinstatement—Claim for intervening period—Article* 102 *applicable.*

(*B*) *Limitation Act* (*XXXVI of* 1963), *Article* 7.

The respondent, a railway servant, who was suspended from service on 7th September, 1955, on conviction by a criminal Court, was dismissed from the services with effect from 21st March, 1957. Subsequently he was acquitted of the charges on appeal, in July, 1958 and a writ petition challenging the order of dismissal was also allowed on 1st November, 1961. The Railway Administration by order dated 2nd February, 1962 reinstated him in service and subsequently by another letter dated 7th June, 1962 referring to the earlier order of reinstatement informed him that the period from the date of dismissal to the date of reinstatement had been regularised as on duty

1. (1948) 2 M.L.J. 331 : I.L.R. (1949) Mad. 229 : A.I.R. 1949 Mad. 173.
2. (1968) 2 S.C.J. 668 : (1968) 3 S.C.R. 119 : A.I.R. 1968 S.C. 1018.

* S.A. No. 1658 of 1969. *15th February, 1973.*

and that he would be eligible for pay and allowance for the intervening period subject to the law of limitation. The respondent filed a suit claiming arrears of salary for the period between the date of suspension and the date of reinstatement *viz.*, 7th September, 1955 to 7th February, 1962. The suit was decreed by the lower Court and the Railway Administration appealed:

Held, the arrears of salary for the period between the date of dismissal and the date of reinstatement is saved from limitation on account of an acknowledgement of liability made by the respondent. But the claim for the period of suspension is barred. [*Paras.* 9 *and* 10]

The right of a public servant to salary accrued from month to month and Article 102 of the Limitation Act, 1908 would apply to a suit for the enforcement of such a right. [*Para.* 8]

When an order of dismissal of a Government servant is declared invalid *ab initio,* it is as if the order in law never existed and the public servant concerned was unlawfully prevented from rendering service. The salary due to the public servant concerned will be accruing month after month because he is wrongfully prevented from rendering service. The period of limitation under Article 102 would commence to run when the wages accrued due and wages accrued due when in law, the public servant becomes entitled to wages. [*Para.* 8]

(C) *Limitation Act* (*IX of* 1908), *section* 19—*Acknowledgement of liability—Extension of limitation—Railway servant —Dismissal—Subsequent reinstatement—Letter of reinstatement intimating eligibility for arrears of salary subject to law of limitation—Amounts to acknowledgment of liability.*

(D) *Limitation Act* (*XXXVI of* 1963), *section* 18.

A communication from the Railway Administration to its employee referring to his earlier reinstatement and further stating that the intervening period between the date of dismissal and the date of reinstatement had been regularised as on duty and that he will be eligible for pay and allowances for the intervening period subject to the law of limitation, would constitute an acknowledgment of liability on the part of the railways of its liability of pay salary for that period and therefore the bar of limitation would be saved.

The law of limitation has nothing whatever to do with the mutual rights and obligations between the master and the servant as to the period for which the master can pay the wages or salary due to the servant and the law of limitation governed only proceedings in Court if and when the matter has not been settled as between themselves. [*Para.* 11.]

Held also, once the public servant was reinstated and the authorities have decided to treat the period from the date of dismissal till the date of reinstatement as on duty, it was a most elementary and plain obligation which they owe to the public servant to pay him his salary and allowances due for the said period without any delay and without raising any obstacles. The authorities should not expect the public servant to file a suit for recovery of the arrears of salary so long as the order of dismissal was in force. Certainly it should not be the attitude of an authority like the Government itself with reference to its employee. [*Para.* 11.]

Cases referred to :—

State of Madras v. *A.V. Anantharaman,* I.L.R. (1963) Mad. 1014: (1963) 2 Lab. L.J. 584: 76 L.W. 428: A.I.R. 1963 Mad. 425; *Jai Chand Sawhney* v. *Union of India,* (1970) 2 S.C.J. 288; *Jagdish* v. *Union of India,* A.I.R. 1969 Punj. and Haryana 441; *Union of India* v. *P.V. Jagannath Rao,* A.I.R. 1968 M.P. 204; *S. Sethuraman* v. *Union of India, owning S. Railway,* (1970) 2 L.L.J. 632; *Union of India, owning the Southern Railway, by the General Manager, Southern Railway* v. *G.A. Krishnaswamy,* A.S. Nos. 489 of 1964 and 29 of 1965.

Appeal against the Decree of the Principal Judge, City Civil Court, Madras in Appeal Suit No. 77 of 1968, preferred against the decree of the Court of the 1st Assistant Judge of City Civil Court, Madras in Original Suit No. 681 of 1965.

P.S. Srisailam, for Appellant.

C. Kanniah, for Respondent.

The Court delivered the following

JUDGMENT:—The defendant in O.S. No. 681 of 1965, on the file of the City Civil Court, Madras *viz.*, the Union of India represented by the General Manager of the Southern Railway, who lost before

the trial Judge as well as the first appellate Judge, is the appellant herein. The facts are not in controversy. The respondent was in the service of the Southern Railway as a Record Sorter and he was suspended from service on 7th September, 1955, on certain charges of criminal conspiracy. The respondent was prosecuted under sections 120-B, 467 and 420, Indian Penal Code and was eventually convicted of those offences and was stentenced to undergo two years' rigorous imprisonment by judgment dated 4th March, 1957. After this judgment in the criminal case was delivered, the appellant dismissed the respondent from service with effect from 21st March, 1957. Against this order of dismissal, the respondent preferred Writ Petition No. 1134 of 1959 on the file of this Court. Meanwhile, the convictions were taken up on appeal and the High Court set aside the convictions and acquitted the respondent of the offences, by an order dated 30th July, 1958. In view of the acquittal of the respondent by the High Court, the writ petition itself was allowed and the order of dismissal of the respondent passed by the Railway was set aside, by an order of this Court on 1st November, 1961. After this order was passed, the appellant reinstated the respondent into the service.

2. Exhibit A-6 an order dated 2nd February, 1962 of the General Manager states that the respondent was "reinstated in service as temporary Record Sorter on pay Rs. 80—110/AS (authorised scale) with immediate effect without prejudice to further action" and that the said reinstatement order was made pursuant to the order of the General Manager dated 8th January, 1962. Subsequently, another communication was issued by the authorities. This communication dated 7th June, 1962 marked Exhibit A-7 addressed to the respondent states:

> "Consequent on your reinstatement in service with effect from 8th February, 1962, vide Office Order quoted above—the intervening period of between the date of dismissal from service and the date of reinstatement (*i.e.*, 21st March, 1957 A.N. to 7th February, 1962) has been regularised as duty. However, you will be eligible for pay and allowances for the intervening period subject to the law of limitation. In this connection you are required to give a declaration as to whether you were in employment anywhere during the intervening period and if so, complete details of such employment should be furnished. In the event of your declaration being found to be false at a later date, please note that you will be liable to be taken up with under the Discipline and Appeal Rules for such false declaration."

By a communication dated 28th June, 1962, marked as Exhibit A-8, the respondent informed the Railway authorities that his eligibility for pay and allowance for the period 21st March, 1957 to 7th February, 1962, was not governed by law of limitation, that for the period between 6th September, 1955 and 21st March, 1957, he was under suspension drawing subsistence allowance, that in view of the judgment in W.P. No. 1134 of 1959 he was entitled to full salary during the period between 6th September, 1955 and 21st March, 1957 also and that, therefore, the Railway was bound to pay him, in addition to the arrears of salary for the period between 21st March, 1957 and 7th February, 1962, full salary for the period between 6th September, 1955 and 21st March, 1957 also, which was not subject to law of limitation. By a communication dated 21st August, 1962, marked as Exhibit A-9 the Railway informed the Counsel for the respondent that sanction for payment of arrears of salary subject to law of limitation was accorded by the competent authority on 22nd September, 1961 and that the respondent would be entitled to arrears of salary for the back pariod of three years from 22nd September, 1961 for which payment was being arranged. The communication further states that the claim for the period beyond three years from 22nd September, 1961, made on behalf of the respondent would be barred by limitation and that the respondent was not entitled to, and had no manner of right to, claim the same. Exhibit A-10 is an office order dealing with fixation of pay of the respondent for the relevant period. Exhibit A-3 is a communication dated 8th February, 1963, addressed by the Railway to the respondent stating that the respondent would be entitled to arrears of salary for a back period of three years from 23rd April, 1962 the date on

which the competent authority sanctioned payment of arrears subject to law of limitation after deducting the salary received by the respondent from the date of his reinstatement into service, *viz.*, on 8th February, 1962, to the date when the competent authority passed orders, *viz.* 23rd April, 1962. (The date 22nd September, 1963, mentioned in Exhibit A-9 was said to be a mistake.)

3. It was under these circumstances the respondent herein instituted the present suit for recovery of arrears of salary from 7th September, 1955 to 7th February, 1962 and for recovery of the balance deducting the subsistence allowance paid to him for the period from 7th September, 1955 to 20th March, 1957.

4. The principal defence of the appellant was that the claim except for a period of three years from 23rd April, 1962, was barred by limitation and consequently the respondent would not be entitled to claim the amount as prayed for by him in the plaint.

5. I may mention in this context that with reference to the amount claimed in the plaint the respondent calculated the total amount payable to him by the Railway as Rs. 6,360.47 and after giving credit for a sum of Rs. 2,741.85 paid to him on 13th September, 1963, the suit was instituted for recovery of the balance of Rs. 3,618.62 only.

6. The trial Judge as well as the appellate Judge in considering the question of limitation relied upon the Bench Decision of this Court in *State of Madras* v. *A. V. Anantharaman*[1], which is directly in point and held in favour of the respondent and decreed the suit as prayed for. Hence the present second appeal by the defendant.

7. Mr. Srisailam, the learned Counsel for the appellant, brings to my notice the decision of the Supreme Court in *Jai Chand Sawhney* v. *Union or India*[2], and contends that by that judgment the decision of this Court referred to already must be deemed to have been impliedly over-ruled and that therefore, following the decision of the Supreme Court, I must hold that the claim of the respondent is barred by limitation. The learned Counsel also brings to my notice two decisions of two other High Courts of this country, the first being *Jagdish* v. *Union of India*[1], holding that a public servant, after his dismissal or removal has been declared to be unlawful, can claim wages of salary only up to a period of three years and two months in lieu of the notice period under section 80, Civil Procedure Code, from the date when the cause of action accrued. In this connection, the Full Bench referred to the decision of the Madras High Court referred to above and declined to follow the same. The other decision is that of the High Court of Madhya Pradesh *Union of India* v. *P.V. Jagannath Rao*[2]. That decision has also taken the view that an order of dismissal of a civil servant passed in violation of section 240 of the Government of India Act, 1935, or Article 311 of the Constitution, is inoperative and void from the very beginning and has no legal effect whatsoever, that when in a suit such an order is declared to be inoperative and void, the declaration of the Court does not make the order void but merely declares or exposes the already existing infirmity in the order. The Court proceeded to say that such an order of dismissal being ineffective from its inception, the civil servant continues in service in spite of the order and it is not necessary that the order should be cancelled or the civil servant should be reinstated and that an order cancelling the dismissal or reinstating the civil servant would be entirely superfluous, and if an order of reinstatement is passed it does not furnish a new cause of action for recovery of salary, and the cause of action for the salary accrues every month. In this view of theirs, they also did not follow the decision of this Court already referred to.

8. Mr. Srisailam relies upon these decisions and contends that the suit instituted by the respondent-plaintiff is barred by limitation except for the period of three years immediately preceding 23rd April, 1962. In view of certain peculiar features present in this case, I am unable to hold that any of the decisions cited applies

1. I.L.R. 1963 Mad. 1014 : (1963) 2 Lab. L.J. 584 : 76 L.W. 428 : A.I.R. 1963 Mad. 425.
2. (1970) 2 S.C.J. 288.

1. A.I.R. 1969 Punj. and Har. 441.
2. A.I.R. 1968 Madh. Pra. 204.

to the present case. As a matter of fact, I have already referred to the communication dated 2nd February, 1961 which has been marked as Exhibit A-6, which reinstated the respondent in service with immediate effect and therefore the very contention of the respondent that he was reinstated only by an order on 23rd April, 1962 is erroneous. The relevancy of the order dated 23rd April, 1962 appears only from the communication of the Railway dated 8th February, 1963, marked as Exhibit A-3. I have already referred to Exhibit A-7 dated 7th June, 1962 which states that the period between the date of dismissal from service and the date of reinstatement, *viz.*, 21st March, 1957 A.N. to 7th February, 1962, has been regularised as duty. Thus, it will be seen that there are two orders, one of reinstatement, *viz.*, Exhibit A-6, dated 2nd February, 1962, and the other treating the period from the date of dismissal till the date of reinstatement as on duty, as is evidenced by Exhibit A-7. This Exhibit A-7, as pointed out already, contains the further statement that the respondent would be eligible for pay and allowances for the intervening period subject to the law of limitation. It is no doubt true that the Supreme Court in the decision referred to already has held that at page 289.

"When the order of dismissal or removal is set aside by the Court on the ground of failure to afford the constitutional protection, the order is declared invalid *ab initio, i.e.*, as if it in law never existed and the public servant concerned was unlawfully prevented from rendering service. If that be the correct view, salary due to the public servant concerned must be deemed to have accrued month after month because he had been wrongfully prevented from rendering service. The period of limitation under Article 102 commences to run when the wages "accrue due", and wages accrue due when in law the servant becomes entitled to wages. Rule 2042 of the Railway Establishment Code, merely provides that "the pay and allowance of a railway servant who is removed or dismissed from service cease from the date of the order of removal or dismissal". That rule does not operate to make the wages accrue due on the date of the institution of the suit. If the order of dismissal is set aside the public servant is deemed to be in service throughout the period during which the order of dismissal remained operative and his right to sue for salary arises at the end of every month in which he was unlawfully prevented from earning the salary, which he could, but for the illegal order of dismissal have earned."

I am of the opinion that this decision does not necessarily lead to the conclusion that the suit of the respondent in the present case is barred by limitation. True, once the order of dismissal is set aside, it is as if that the public servant concerned all along continued to remain in service and no further order on the part of the authority reinstating the public servant in service is necessary. But, nonetheless, some order on the part of the competent authority is necessary to give a posting to the public servant concerned. Further, there is the problem as to how the period under suspension should be treated in case the order of dismissal is preceded by suspension as it happened in the present case.

Rule 2044 of the Railway Establishment Code states:—

"When a railway servant who has been dismissed, removed, compulsorily retired or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order:

(*a*) regarding the pay and allowance to be paid to the railway servant for the period of his absence from duty; and (*b*) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in sub-rule (1) is of the opinion that the railway servant has been fully exonerated or, in the case of suspension that it was wholly unjustified, the railway servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed, compulsorily retired or suspended as the case may be.

(3) In other cases, the railway servant shall be given such proportion of such pay and allowances as such competent authority may prescribe.

Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowances are admissible;

Provided further that such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under Rule 2043 (P.R. 53).

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes".

Perhaps it was pursuant to this provision, Exhibit A-7 was sent to the respondent herein. However, no material was placed before me to show as to what order was passed by the competent authority with regard to the period of suspension. In view of these peculiar facts of this case, the question for consideration is whether the suit of the respondent was barred by limitation or not.

9. Even though the decision of the Supreme Court has held that Article 102 of the Limitation Act applied and the right of the public servant to salary accrued from month to month, still, I am clearly of the opinion that Exhibit A-7 constitutes an acknowledgment of liability on the part of the appellant of its liability to pay salary to the respondent herein for the period from 21st March, 1957 to 7th February, 1962; and, therefore, the bar of limitation is saved. No doubt, the very communication Exhibit A-7 states that the respondent would be eligible for pay and allowances for the intervening period "subject to the law of limitation". In my opinion, such a statement is totally of no avail. The law of limitation has no application whatever to the obligation of a master to pay salary to his servant and the law of limitation is applicable only to proceedings in Court and therefore the reference to law of limitation in Exhibit A-7 is clearly erroneous. Once the competent authority had decided to reinstate the respondent in service and treat the period from the date of dismissal to the date of reinstatement as on duty, it was the patent and obvious duty of the appellant to pay the salary due to the public servant concerned for the period in question; and, there being no law prescribing the period for which alone the appellant could pay the salary to the respondent herein the statement contained in Exhibit A-7 must be considered to be an unconditional acknowledgment of the liability of the appellant to pay to the respondent the salary due to him for the intervening period. As pointed out already, as soon as the competent authority passed orders reinstating the respondent in service, treating the period from the date of dismissal to the date of reinstatement as on duty, it was the obvious duty of the appellant to pay the salary due to the respondent for the relevant period, and it committed an error in not paying the salary. The appellant cannot take advantage of its own wrong to defeat the just claim of the respondent. This aspect of the claim of the respondent being saved by the acknow-ledgment of the appellant referred to, has been elaborately considered by Ramamurti, J., in *S. Sethuraman* v. *Union of India, owning S. Railway*[1]. The principle of 'acknowledgment' enunciated by the learned Judge clearly applies to the facts of this case as mentioned by me above. The said decision of Ramamurti, J., has been approved by a Bench of this Court (Sadasivam and Ramaswami, JJ.) in *Uniou of India owning the Southern Railway by the General Manager, Southern Railway* v. *G. A. Krishnaswamy*[2]. I may point out that the Supreme Court had no occasion to deal with this question of 'acknowledgment'. In that case, the railway employee concerned instituted the suit for setting aside the order of his removal on the grounds that the same was made by an authority subordinate to the appointing authority and that he was not given an opportunity to show cause against the action proposed to be taken in regard to him as required by section 240 of the Government of India Act, 1935. In the very same suit he claimed a decree for Rs. 20,399-9-0 being the amount of arrears of salary and damages for wrongful termination of employment.

1. (1970) 2 L.L.J. 632.
2. A.S. Nos. 489 of 1964 and 29 of 1965.

Consequently, the Supreme Court had no occasion to consider a case in which after the order of dismissal or removal was set aside by proceedings taken in this behalf, independent, proceedings were subsequently taken to recover the arrears of salary and during the interval the competent authority having passed orders reinstating the Government servant and treating the period between the date of removal or dismissal and the date of reinstatement as on duty. In view of this position, I share the observations made by Ramamurti, J. reserving the question for consideration, if the matter is directly and exclusively governed by Rule 2044 of the Railway Establishment Code.

10. However, I may point out that the claim of the respondent for the balance of salary for the period during which he was under suspension, stands on a different footing As I have pointed out already, under Rule 2044 of the Railway Establishment Code, the competent authority has to decide, having regard to the circumstances of the case, as to how the period of suspension should be treated and what pay and allowances should be paid to the respondent during that period. No material whatever has been placed before the Court to show how the competent authority treated the said period of suspension and what order that authority passed with regard to the pay and allowances due to the respondent during that period, None of the documents produced before the Court also contains any acknowledgment with regard to the balance of the salary for the period of suspension. In the absence of any such material, the principle laid down by me, as above, which applies to the case of salary for the period from the date of dismissal till the date of reinstatement, will not apply to the period of suspension.

11. Before parting with the case, I must express my respectful agreement with the observations made by Ramamurti, J., in paragraph 17 of his judgment. Once the respondent herein was acquitted of the offences charged against him, and the order of dismissal passed on the earlier conviction, was set aside by this Court, the obvious conclusion is that the respondent herein was unlawfully kept away from service for no fault of his. In this case, there is a further injustice. The respondent was dismissed from service solely on the basis of his conviction by the criminal Court. That conviction was set aside by this Court on 30th July 1958. It was the plain duty of the Railway Authorities to set aside the order of dismissal and reinstate the respondent, immediately, since the sole basis for the order of dismissal had ceased to exist. The authorities did not do any such thing and even the request of the respondent in this behalf was rejected. If the authorities had reinstated him then, even on the assumption that the law of limitation applied as between them, even the period of suspension would have fallen within the period of three years. They waited for this Court to quash the order of dismissal in the writ petition. However, once he was reinstated and the authorities had decided to treat the period from the date of dismissal till the date of reinstatement as on duty, it was the most elementary and plain obligation which they owed to the respondent to pay him the salaries and allowances due for the said period without any delay and without raising any obstacles. The authorities could not have expected the respondent to have filed a suit for recovery of the arrears of salary so long as the order of dismissal was in force. Even for the sake of saving his right to recover the salary from being barred by limitation, if he had been instituting suits every three years for recovery of the arrears of salary, on incurring considerable expenditure, the suits would have been summarily dismissed, because, so long as the order of dismissal stood, no Court could have granted him a decree for the arrears of salary. It is too much to expect of a poor employee who has been dismissed from service, to go on filing suits and preferring appeals incurring huge expenditure and keeping the matter alive in the hope and confidence that he will ultimately succeed in his attempt to have the order of dismissal itself cancelled or quashed by the Court. Even assuming, if such a thing happens, ultimately the Railway will have to pay not only the salaries due to the servant concerned but also the expenses which he incurred in prosecuting his claim for arrears of salary, which necessarily have

to come only out of the public funds. Certainly, that should not have been the attitude of an authority like the Government itself with reference to its own employees. As I pointed out already it is really surprising that the authorities should have taken up the stand, when they sent the communication marked Exhibit A-7, that the respondent would be paid his pay and allowances "subject to the law of limitation". I may mention even at the risk of repetition that the law of limitation has nothing whatever to do with the mutual rights and obligations between the master and a servant as to the period for which the master could pay the wages or salary due to the servant and that the law of limitation governs only proceedings in Court if and when the matter has not been settled as between themselves. As I pointed out already, there being no law or rule preventing a master like the appellant, from paying the salary due to a servant like the respondent, in excess of a period of three years, if the same had not been paid as and when it accrued due, for some reason or other, certainly it was not proper on the part of the Railway authorities to inform the respondent that he would be paid salary only for a period of three years from the date when the competent authority took the decision to treat the period between the date of dismissal and the date of reinstatement as on duty and thereby implying that the respondent should have filed a suit earlier for recovery of arrears of salary, even when the order of dismissal was in force.

12. In the result, the second appeal is dismissed with the modification that the decree passed in favour of the respondent will be restricted to the right of receive the salary for the period from 21st March, 1957 A.M. to 7th February, 1962. The respondent will be entitled to proportionate costs in the two Courts below. Since the respondent is not represented before this Court, there will be no order as to costs in the second appeal. No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

T. K. Santhanagopala Chettiar and others .. *Appellants**

v.

Thimmi M. Seetharama Chettiar and others .. *Respondents.*

and

Thimmi M. Seetharama Chettiar and another .. *Appellants*

v.

T. K. Santhanagopala Chettiar and others .. *Respodents.*

(A) *Tamil Nadu Hindu Religious and Charitable Endowments Act* (*XXII of* 1959), *section* 63 *and Constitution of India* (1950), *Article* 26—*Institution, whether a religious institution or not—Deputy Commissioner to decide—Temple, whether a denominational temple or not—Jurisdiction—Civil Court—Civil Procedure Code* (*V of* 1908), *section* 9.

Under section 63 of the Tamil Nadu Hindu Religious and Charitable Endowments Act the Deputy Commissioner is given the exclusive jurisdiction to decide the question whether an institution is a religious institution. But the question whether a temple is a denominational temple coming under Article 26 of the Constitution is certainly not within his jurisdiction. The question falls within the jurisdiction of the civil Court. [*Para.* 1.]

(B) *Tamil Nadu Hindu Religious and Charitable Endowments Act* (*XXII of* 1959), *section* 6 (18)—*Religious Institution—Temple—Suit—Civil Court—Plaint—Seeking declaration that temple belongs to a particular community—Temple, if a denominational temple—Civil Court—Jurisdiction—Pleadings.*

The averments in the plaint go to show that the temple is a religious institution as defined under the Act and the plaint seeks a declaration that the temple is one founded by a particular community managed and administered by them and that the temple belonged to that community. There is nothing in the plaint to show that the plaintiffs claimed it as a private temple. On the pleadings the

* L. P. A. Nos. 58 of 1968 and 31 of 1969.
27th June, 1973.

substantial question is whether the temple is a denominational temple and the civil Court has jurisdiction to decide the question.

(C) *Civil Procedure Code* (*V of* 1908), *section* 80—*Notice—Suit against Area Committee and Commissioner, Hindu Religious Endowments Board—No notice under section* 80 *given—Suit fails.*

Notice under section 80 of the Civil Procedure Code is necessary to claim any relief against the Area Committee and the Commissioner of the Hindu Religious Endowments Board in a suit instituted by the plaintiff claiming a declaration that the temple is a denominational temple. In the absence of such notice, the suit will fail as against such defendants.

[*Para*. 3.]

Cases referred to:—

Dr. Ananda Baliga v. *Ananteswar Temple*, (1952) 1 M.L.J. 678 : 65 L.W. 450 ; A.I.R. 1952 Mad. 767 ; *Santhana Gopala Chettiar* v. *Seetharama Chettiar*, (1968) 2 M.L.J. 41.

Appeals under clause 15 of the Lette s Patent against the Decree of the Honourable Mr. Justice Ismail, dated 29th January, 1968 and passed in A.A.O. No. 338 of 1965 (in A.S. No. 103 of 1964, Sub-Court, Kumbakonam, O.S. No. 359 of 1963, District Munsif's Court, Kumbakonam).

K. S. Desikan and *K. Raman*, for Appellant in L.P.A. No. 58 of 1968.

The Additional Government Pleader, for Respondent in L.P.A. No. 58 of 1968.

N. R. Govindachariar and *W. Somasundaram*, for Appellants in L.P.A. No. 31 of 1969.

The Additional Government Pleader, *K. S. Desikan* and *K. Raman*, for Respondents in L.P.A. No. 31 o. 1969.

The Judgment of the Court was delivered by

Ramaswami, J.—The two Letters Patent Appeals are against the Judgment of Ismail, J. disposing of A.A.O. No. 338 of 1965. The appellants in L.P.A. No. 31 of 1969 are the plaintiffs in O.S. No. 359 of 1963 on the file of the Court of the District Munsif of Kumbakonam. The suit is for a declaration that the suit temple belonged to the members of Pattusaluvar community exclusively and that they alone own the temple and worship the deity of the temple and that nobody else had any right in the properties acquired for the said temple. There was also the prayer for accounting by defendants 1 and 2 who had been appointed as trustees for the temple by the Area Committee and approved by the Commissioner, Hindu Religious and Charitable Endowments Department. On the whole, there were six defendants in the suit. Defendants 1 to 3 were the trustees appointed for the temple. The fourth defendant is a lessee of the temple properties. The fifth defendant is the Area Committee and the sixth defendant is the Commissioner himself. One of the contentions raised by the defendants is that the suit is not maintainable in the civil Court inasmuch as the main question that falls for determination is within the exclusive jurisdiction of the Deputy Commissioner under section 63 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (Tamil Nadu Act LII of 1959) (hereinafter referred to as the Act). This contention was upheld by the trial Court and the suit was dismissed. On appeal by the plaintiffs, the learned Subordinate Judge of Kumbakonam held that the question that arises in the suit is whether the temple is a denominational temple or not, that that question is not one coming under section 63 of the Act, that therefore the jurisdiction of the civil Court is not ousted and that the trial Court should decide the suit on merits. The learned Subordinate Judge remanded the suit for trial on other issues. The contesting defendants filed A.A.O. No. 338 of 1965 against the abovesaid remand order and Ismail, J., reversed the decision of the learned Subordinate Judge holding that the question relating to the nature of the institution is one coming under section 63 of the Act and that the civil Court has no jurisdiction to go into that question. He therefore held that the learned Subordinate Judge ought not to have remanded the suit for trial on other issues. However, the learned Judge further held that there is no bar for the civil Court to go into the claim of accounting that is prayed for in the suit. The

learned Judge upheld the order of remand by the learned Subordinate Judge to the extent of the claim relating to accounting. L.P.A. No. 31 of 1969 has been filed by the plaintiffs challenging the decision of the learned Judge regarding the question of maintainability of the suit in the civil Court. The contesting defendants have filed L.P.A. No. 58 of 1968 challenging the further finding of the learned Judge that the civil Court can decide the question of accounting by defendants 1 and 2.

2. It is not disputed before us that if the substantial question to be decided in the suit is as to whether the temple is a denominational one or not, the jurisdiction of the civil Court could not be ousted under the provisions of the Act. Under section 63 of the Act though the Deputy Commissioner is given the exclusive jurisdiction to decide as to whether any institution is a religious institution or not, the question whether a temple is a denominational temple coming under Article 26 of the Constitution is certainly not within his jurisdiction. That is a question which has necessarily to be decided by the civil Court. It has been so held in *Dr. Ananda Baliga* v. *Ananteswar Temple*[1]. The learned Judge who disposed of C. M. A. No. 338 of 1965 also recognises this position. His judgment is reported in *Santhana Gopala Chettiar* v. *Seetharama Chettiar*[2]. At page 45, the learned Judge observes thus:

> " Whether the respondents will be entitled to file a suit in a civil Court for a declaration that the suit temple is a denominational temple entitled to the protection conferred by Article 26 of the Constitution of India and that the provisions contained in the Madras Hindu Religious and Charitable Endowments Act, 1959, can be applied only subject to the constitutional right is recognised by section 107 of the Act itself and that in any particular matter the authorities under the Act have not kept within their limits with reference to the rights of the denomination under Article 26 of the Constitution, does not arise for my consideration in the present suit and therefore my decision in this case will not affect any such question".

The learned Judge has proceeded on the footing that in the present suit the prayer is not for a declaration that the temple is a denominational one. It is no doubt true that in the prayer it has not been made clear that the plaintiffs wanted a declaration that the temple is a denominational one. But a reading of the entire plaint makes it abundantly clear that what the plaintiffs want is a declaration that the temple is a denominational one. At any rate, the main question that falls for determination in the suit is as to whether the temple is one founded by Pattusaluvar community managed and administered by them and whether the temple belongs to them. Unfortunately the prayer in the plaint is not couched in proper words. Prayer (a) in the plaint is as follows:

> " To pass a decree in favour of the plaintiffs declaring that Sri Rajagopalaswami Temple set out in Schedule '*A*' and its properties set out in Schedules 'B' and 'C' exclusively belong to Pattusaluvar community residents of Solamalingai village and directing the defendants 1 to 3 to put the plaintiffs in possession of the same."

Nowhere in the plaint is there any allegation that the temple is not a religious institution as defined under the Act. The very averments in the plaint go to show that it is a temple as defined in the Act and it is conceded that the members of the particular community had a right of worship in the temple. The learned Judge seems to have understood the pleadings in the plaint as saying that the temple in question was a private temple. But there is nothing in the plaint to show that the plaintiffs claimed the temple as a private temple not coming under the definition of the terms "religious institution" or "temple" under the Act. If the question really is as to whether the temple is a religious institution as defined under the Act or not, naturally it would be a question exclusively within the jurisdiction of the Deputy Commissioner as per the provisions of section 63 of the Act. But as a matter of fact that is not the question to be decided in the suit because from the very averments it is clear that the plain-

1. (1952) 1 M.L.J. 678: 65 L.W. 450: A.I.R. 1952 Mad. 767.
2. (1968) 2 M.L.J. 41.

tiffs concede that it is a religious institution as defined under the Act. All that they claim is that it is a denominational temple entitled to the protection contained in Article 26 of the Constitution, though it is not so specifically stated in so many words. Under these circumstances, we are of the view that the civil Court has jurisdiction to entertain the suit regarding the main prayer also.

3. There is yet another point which arises in these appeals. As we said earlier, the fifth defendant is the Area Committee and the sixth defendant is the Commissioner. The learned Judge has held that notice under section 80 of the Code of Civil Procedure, is necessary to claim any relief as against defendants 5 and 6, and because no such notice has been given by the plaintiffs before instituting the suit, the suit should necessarily fail as against those two defendants. This finding of the learned Judge is not being challenged by the learned Counsel for the plaintiffs who are the appellants in L.P.A. No. 31 of 1969. That means, the said two defendants, namely, defendants 5 and 6 shall stand struck off from the plaint and the suit shall proceed on other issues only as against defendants 1 to 4.

4. From what we said earlier, it follows that L.P.A. No. 58 of 1968 should be dismissed. Accordingly, L.P.A. No. 31 of 1969 is allowed to the extent indicated above. L.P.A. No. 58 of 1968 is dismissed. The parties will bear their respective costs in this Court.

V.S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT:—*M. M. Ismail, J.*

K. V. Krishna Iyer .. *Petitioner**

v.

The President, Panchayat Board, Meyyanur, Salem District and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (Madras Act XXVI of 1948), sections 5 (2), 67 (2) (d)—Ryotwari Patta—Grant of—Revision against grant—Delay in filing —Rejection by Assistant Settlement Officer—Delay condoned by higher authority—Validity.

By a G.O. No. 3190, Revenue dated 17th October, 1955, the State Government prescribed the period of limitation for filing a revision against the orders of the Assistant Settlement Officer under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 and expressly excluded the application of section 5 of the Indian Limitation Act by an Explanation. On the question whether, a delay can be condoned by the Director of Settlements as appellate authority on revision, which cannot be condoned by the lower authority,

Held, section 5 (2) of the Madras Act (XXVI of 1948) itself does not give power to the Director of Settlements while revising the order of the Settlement Officer, to do what the Settlement Officer cannot do. Whenever an appellate authority, or a revisional authority interferes with an order of the lower authority, and passes an order, that authority passes the order which in its opinion the lower authority ought to have passed in accordance with law. If the lower authority had no power to condone the delay, the appellate authority cannot condone that delay occurring before the lower authority and on that ground set aside the order of the lower authority.

[*Para.* 2.]

* W. P. No. 2232 of 1968. *5th January, 1972.*

On the general principle that a special provision excludes the applicability of the general provision, with regard to the orders made under section 11 of the Act of 1948, it is the rule mentioned above that is exclusively applicable. Therefore, the Explanation to the rule excluding the application of section 5 of the Limitation Act will govern even the revision petitions preferred to the Director of Setlements and the Board of Revenue against the orders of the Settlement Officer in revision preferred against the order of the Assistant Settlement Officer made under section 11 of the Act of 1948. Consequently even the Director of Settlements has no power to condone the delay in preferring the revision petition to him falling under the rule made in G.O. No. 3190, Revenue, dated 17th October, 1955.

[*Para.* 3.]

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 4th respondent in B. P. Petition 253/68 dated 3rd May, 1968 confirming the orders of the 3rd respondent in Rc (F2) 31303/67 dated 5th March, 1968 and quash the same.

S. R. Srinivasan, for Petitioner.

T. Satyadev and *R. Sundaralingam*, for Respondents.

The Court made the following

ORDER.—The Assistant Settlement Officer, Salem, on 30th June, 1967 passed an order allowing a ryotwari patta to the petitioner herein in respect of S. No. 64/4 promeasuring 0.69 acre in Meyyanur village in Salem taluk and district. Against this order, the first respondent herein preferred a revision petition to the Settlement Officer, party No. 111, Madras-7, on 16th September, 1967. The Settlement Officer found, after deducting the time taken for obtaining the certified copy of the order of the Assistant Settlement Officer, that the revision petition was filed after 43 days from the date of the order of the Assistant Settlement Officer. Since the prescribed period of limitation was only 30 days and the revision petition was filed after a delay of 13 days, he stated that the delay had not been properly explained and, therefore, by an order dated 10th October, 1967 rejected the revision petition *in limine*. Against this order, the first respondent herein preferred a revision petition to the Director of Settlements, Madras-5. The Director of Settlements by an order dated 5th March, 1968, purporting to act under section 5 (2) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, (Madras Act XXVI of 1948) hereinafter referred to as the Act condoned the delay, set aside the order of the Settlement Officer, Salem and remanded the case to him for fresh disposal on merits. The petitioner herein preferred a revision petition to the Board of Revenue against this order of the Director of Settlements and the Board by its order dated 3rd May, 1968 dismissed the revision petition. It is, thereafter, the petitioner has filed the present writ petition praying for the issue of a writ of *certiorari* to quash the order of the Director of Settlements, as confirmed by the Board of Revenue.

2. The point that is raised in this writ petition lies in a very narrow compass. Pursuant to section 67 (2) (*d*) of the Act, the Government in G.O. No. 3190, Revenue, dated 17th October, 1955 made the following rule:

"Revision petitions against the orders of an Assistant Settlement Officer under section 11 of the said Act shall be presented to the Settlement Officer concerned within fifteen days from the date of conduct of rough patta objection hearing or the date of publication of this notification, whichever is later, in the areas where section 11 enquiries have already been conducted separately under the old procedure and within thirty days of the conduct of final settlement enquiry or within fifteen days of the date of publication of this notification, whichever is later, in areas where section 11 enquiries are conducted along with the rough patta objection hearing under the new procedure. Further revision petition shall lie to the Director of Settlements and the Board of Revenue against the orders of the Settlement Officer and the Director of Settlements respectively within

thirty days of the date of their respective orders.

Explanation.—Section 5 of Indian Limitation Act, 1908 (Central Act IX of 1908) shall not apply to revision petitions coming within the purview of this rule".

Thus it will be seen that for preferring a revision petition to the Settlement Officer the period of limitation prescribed is only 30 days and this rule expressly states that section 5 of the Indian Limitation Act shall not apply to revision petitions coming within the purview of this rule. That means, once a revision petition is filed beyond the period of limitation prescribed in the rule, the Settlement Officer will have no jurisdiction whatever to entertain the same, and to deal with the same on merits. It is only because of this provision the Settlement Officer dismissed the revision petition of the first respondent *in limine*. However, the Director of Settlements when he interfered with the order of the Settlement Officer stated that he was competent to condone the delay by virtue of section 5 (2) of the Act. I am of the opinion that the Director of Settlements committed a patent error of law in coming to this conclusion. Section 5(2) of the Act merely states:

"Every Settlement Officer shall be subordinate to the Director and shall be guided by such lawful instructions as he may issue from time to time; and the Director shall also have power to cancel or revise any of the orders, acts or proceedings of the Settlement Officer, other than those in respect of which an appeal lies to the Tribunal".

In my opinion, this section itself does not give power to the Director of Settlements while revising the order of the Settlement Officer, to do what the Settlement Officer himself cannot do. Whenever an appellate authority, or a revisional authority interferes with an order of the lower authority and passes an order, that authority passes the order which in its opinion the lower authority ought to have passed in accordance with law. If the lower authority had no power to condone the delay the appellate authority cannot condone that delay occurring before the lower authority and on that ground set aside the order of the lower authority. That is exactly what the Director of Settlements has done in the present case. No doubt, by G.O. No 159, Revenue, dated 9th January, 1963, the Government in exercise of the powers conferred by clause (6) of sub-section (2) of section 67 read with sub-section (2) of section 5 and clauses (*c*) and (*d*) of section 7 of the Act made the following rule:

"1 (1) Any person who objects to any of the orders, acts or proceedings of a Settlement Officer, other than those in respect of which an appeal lies to the Tribunal, may prefer a revision petition to the Director.

(2) Any such petition shall be preferred within one month from the date on which these rules are published in the Fort St. George Gazette or within two months from the date of communication of the order or proceeding of the Settlement Officer, whichever of the dates aforesaid is the latest:

Provided that the Director may admit a petition preferred after the period aforesaid if he is satisfied that the petitioner had sufficient cause for not preferring the petition within the said period".

But the proviso to sub-rule (2) merely enables the Director to admit the petition preferred after the period of limitation prescribed for preferring such a revision petition to him and certainly this proviso does not enable the Director to condone the delay occurring in the revision petition preferred to the Settlement Officer, who himself had no power to condone the delay. As a matter of fact, it is his confusion that has been responsible for the orders passed by the Director and the Board in this particular case. It is conceded that the Settlement Officer by virtue of the Explanation to the rule extracted already had no power to condone the delay. If he had no power to condone the delay, neither the Director of Settlements, nor the Board of Revenue had any power to condone that delay and on that basis set aside the order of the Settlement Officer and to remand the matter to the Settlement Officer. I may point out again that the power to condone the

delay available to the Director of Settlements, is a power to condone the delay in preferring a revision petition to him beyond the period of limitation prescribed therefor and not a power to condone the delay in preferring a revision petition to the Settlement Officer, which the Settlement Officer himself had no power to condone.

3. Looked at from another point of view, also the orders of the Director of Settlements and the Board of Revenue are erroneous in law. As I pointed out earlier, both the Director of Settlements and the Board of Revenue relied on section 5 (2) of the Act and obviously on the rule made by the Government in G.O. No. 139, Revenue dated 9th January, 1963. I am of the opinion that the said section 5 (2) and the rule referred to have no application to the revision petition preferred by the first respondent to the Director of Settlements. The rule made by the Government in G.O. No. 3190, Revenue dated 17th October, 1955 itself provides for revision petitions to the Director of Settlements and the Board of Revenue and also prescribes the period of limitation therefor, in respect of orders made under section 11 of the Act, Hence, section 5 (2) is a general provision, while the rule made by the Government in G.O. No. 3190, Revenue, dated 17th October, 1955 is a special provision dealing with the orders made under section 11 of the Act. On the general principle that a special provision excludes the applicability of the general provision, with regard to the orders made under section 11 of the Act, it is the rule mentioned above that is exclusively applicable. Therefore, the Explanation to the rule excluding the application of section 5 of the Limitation Act, will govern even the revision petitions preferred to the Director of Settlements and the Board of Revenue, against the orders of the Settlement Officer in revision preferred against the order of the Assistant Settlement Officer made under section 11 of the Act. Consequently, even the Director of Settlements had no power to condone the delay in preferring the revision petition to him falling under the rule made in G.O. No. 3190, Revenue, dated 17th October, 1955.

4. Under these circumstances, the writ petition is allowed and the impugned orders of the Director of Settlements and the Board of Revenue are quashed. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and Natarajan, JJ.*

R. M. AR. RM. Ramanathan Chettiar alias **R.M. A.R. Ramanathan Chettiar** .. *Appellant**

v.

S.M.O. Oomanathan Chettiar .. *Respondent.*

and

S.M.O. Othaman Chettiar .. *Appellant*

v.

A.R. R.M. Valliammai Achi .. *Respondent.*

Tamil Nadu Agriculturists Relief Act (*IV of* 1938) *as amended by Tamil Nadu Agriculturists Relief* (*Amendment*) *Act* (VIII *of* 1973), *section* 8—*Suit for recovery of money—Defendant agriculturist*—Explanation I *to section* 8—*Scope of Amendment—Effect—Amount repayable—Interpretation of Statutes—Report of Select Committee—Whether could be relied on—Intention of the Legislature to be deduced from the language used.*

In view of the provisions in section 8 (1) of the Madras Act IV of 1938 that all outstanding interest on 1st October, 1937, shall be deemed to have been wiped out, it was not open to a creditor thereafter to exercise his right of appropriation and all such payments should be appropriated only towards the principal. [*Para.* 15.]

The effect of the *Explanation* I introduced by the Amending Act XXIII of 1948 was

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*A.No. 408 of 1967 and. Memo of Cross-objections and C.M.P.No. 7032 of 1973 and A.No. 150 of 1968 and C.M.P.No. 7385 of 1973.

7th September, 1973.

to statutorily appropriate all payments made by a debtor to the creditor towards the principal amount except in the single case where the debtor had expressly stated in writing that such payment should be in reduction of interest. The *Explanation* had real and vital impact only on sub-section (3) of section 8 of the Act of 1938 since the question of appropriation would arise with regard to that sub-section for the purpose of finding out whether it was the entire principal that was outstanding or portion of the principal that was outstanding and if so, what portion. For that purpose, the sub-section even necessitated the reopening of the appropriation already made. Even with this *Explanation*, sub-section 3 could be given effect to in full.

The Amending Act VIII of 1973 has made a vital change in section 8. In the opening portion of the section, for the expression 1st October, 1932, the expression "1st March, 1972" has been substituted. Sub-section (1) has been omitted. In sub-section (4) of section 8 reference to sub-section (1) has been omitted in view of the omission of sub-section (1) itself. In *Explanation I* for the expression "unless he has expressly stated," the expression, "notwithstanding that he has expressly stated" has been substituted. The effect of this change is that this section applies to all debts incurred by an agriculturist before the 1st March, 1972. [*Paras.* 20 *and* 25.]

The effect of this *Explanation* is to put an end to all the appropriations already made either with reference to sections 59 to 61 of the Indian Contract Act before the introduction of *Explanation-I*, for the first time to section 8 by the Amendment Act XXIII of 1948 or with reference to *Explanation I* to section 8 as introduced by the Amendment Act XXIII of 1948 and to statutorily and compulsorily appropriate all payments made by a debtor to a creditor only towards the principal. As a matter of fact, the appropriations already made have to be reopened for the purpose of applying the provisions of the Act and for finding out the payment repayable by a debtor. [*Para.* 25.]

By virtue of *Explanation I* as amended by the 1973 Act, the position was completely changed. The principal amount minus all payments would always be smaller than twice the principal amount minus the said payments. The contingency contemplated by sub-section (3) namely, in some cases the difference between twice the principal amount minus all payments could be smaller than the principal amount or the portion of the principal amount outstanding became unreal and had no significance whatever in view of the amendment made to *Explanation I* by the 1973 Act. The Amendment of *Explanation I* had produced a totally unintended result and consequence of not only wiping out all interest but also adjusting even the amount already paid as and for interest only towards the principal.

[*Paras.* 26 *and* 28.]

The inevitable conclusion would be if the amended *Explanation I* was given effect to, with reference to sub-section (3) of section 8 of the Act, the principal amount alone in case no payment whatever had been made, would be repayable by a debtor, because that would be smaller than twice the principal amount and such portion of the principal amount as was outstanding alone would be repayable in case where some payments had been made and those payments had been appropriated towards the principal, since that portion of the principal amount would be smaller than twice the principal amount minus the said payments. [*Para.* 30.]

The provisions of section 8 of the 1938 Act dealt with debts incurred before 1st October, 1932, while the provisions of section 8 of the 1938 Act as amended by the 1973 Act deal with debts incurred before 1st March, 1972. Consequently section 8 of the 1938 Act as amended by the 1973 Act constitutes a new legislation with referene to all debts incurred by an agriculturist prior to 1st March, 1972. [*Para.* 36.]

In the instant case, when the suit was instituted the defendant had repaid a sum of Rs. 10,000 as against the principal of Rs. 12,000. Section 8 of the 1938 Act became applicable to the defendant only by virtue of the amendment of 1973. By that time, the defendant had paid a further sum of Rs. 84,86.89, because he admitted his liability to that amount,

consequently, by the time the 1973 Act came into effect, the defendant had paid a sum of Rs. 18,486.89. If this amount was appropriated towards the principal, as provided for in *Explanation I* as amended by the 1973 Act, the defendant had paid a sum of Rs. 6,486. 89 in excess of the principal and therefore no part of the principal was outstanding as on the date of the publication of the 1973 Act. Consequently no further amount was payable by the defendant to the plaintiff. By virtue of secion 8 (4) of the Act, the defendant would not be entitled to a refund of the excess sum paid by him. Accordingly the decree of the lower Court was modified confining it to a sum of Rs. 8,486.89. [*Para.* 37.]

The reports of the Select Committee cannot be taken into account by a Court as an aid to the construction of statutes, though they may be referred to for ascertaining the conditions prevailing at the time when a statute was enacted and the purpose of making a particulr enactment. The object of all interpretation is to discover the intention of the Legislature and the intention of the Legislature must be deduced from the language used, for it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.

[*Para.* 28.]

Cases referred to:—

Muthuswami Odayar v. *Savarimuthu Udayar*, (1963) 1 M.L.J. 171: I.L.R. (1963) Mad. 274: 76 L.W. 63: A.I.R. 1963 Mad. 249; *Cory Bros. & Co.* v. *Owners of the Turkish Steamship "Mecca"*, (1897) A.C. 286; *Rayan Duraiswamy Aiyangar and others* v. *M. Raghavachariar*, I.L.R. (1941) Mad. 57: (1940) 2 M.L.J. 648: A.I.R. 1941 Mad. 107; *Chittpragada Veeraraju and another* v. *Muppala Rayanim Dora Garu and others*, A.I.R. 1940 Mad. 940; *Kallakuri Venkateswarlu and others* v. *Kalidindi Narayanaraju and others*, (1946) 1 M.L.J. 272: A.I.R. 1946 Mad. 380; *A.S. Duraiswamy Mudaliar and another* v. *Muhammad Amiruddin and others*, (1948) 1 M.L.J. 441: A.I.R. 1948 Mad. 434; *Ramaswami Aiyar* v. *Ramayya Sastrigal*, (1941) 1 M.L.J. 295: A.I.R. 1941 Mad. 571; *Venkiteswara Aiyar* v. *Ramaswami Aiyar*, (1941) 1 M.L.J. 9; A.I.R. 1941 Mad. 403 : *Garimella Suryanarayana* v. *Gada Venkataramana Rao*, I.L.R. (1953) Mad. 295: (1953) 1 M.L.J. 267; A.I.R. 1953 Mad. 458; *Rama Shah* v. *Lalchand*, 67 I.A. 160 : (1940) 1 M.L.J. 895: 51 L.W. 578; A.I.R. 1940 P.C.63: *Murray* v. *Commissioners of Inland Revenue*, (1918) A.C. 541; *Nokes* v. *Doncaster Amalgamated Collieries Ltd*,. (1940) A.C. 1014; *Pye and others* v. *Minister for Lands for New South Wales*, (1954) 3 All E.R. 514; *Inland Revenue Commissioners* v. *Hunchy*, (1960) A.C. 748.

Appeals and Memo. of Cross-Objections against the decree of the Court of the Subordinate Judge, Devakottai, dated 9th March, 1967 and passed in Original Suit Nos. 50 of 1965 and 38 of 1966 respectively and petition praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to dispose of the appeals under the Tamil Nadu Act IV of 1938 as amended by Act VIII of 1973.

N.G. Krishna Ayyangar, for Appellant.

G. Jagadisa Iyer and *S. Somasundaram*, for Respondent.

S. Kothandarama Nainar, *P.S. Ramachandran* and *V. Sridevan*, for the Bar.

The Judgment of the Court was delivered by

Ismail, J.—A. S. No. 408 of 1967 has been preferred by the defendant in O. S. No. 50 of 1965 on the file of the Court of the Subordinate Judge of Devakottai. The respondent in that appeal instituted the suit for recovery of a sum of Rs. 17,566.16, as per *vaddi chittai* filed along with the plaint, with subsequent interest. According to him, the appellant and the respondent had an open, mutual and current account between them at Shanmughanathapuram and they carried on the said dealings from 16th April, 1953 to 3rd December, 1953 on which date the amount due by the appellant to the respondent was Rs. 12,000. Under the agreement, interest on the respective amounts had to be calculated and added to the principal at the end of each Tamil year at the prevalent rates of interest. His further case was that the rate of interest at the outset, was at nine annas *per centum per mensem*, that it was later on increased to ten

annas *per centum per mensem* from 16th April, 1956, that it was 11 annas *per centum per mensem* from 17th April, 1958 and that finally it was 12 annas *per centum per mensem* from 16th April, 1960 and that these rates of interest followed the prevalent increases of bank rates in accordance with the trade usage of the parties. The respondent further stated that four payments had been made by the appellant through his agent and that he had given receipts to that agent and that the said four payments were open payments and were made as follows:

(1) Rs. 5,000 on 2nd May, 1962; (2) Rs. 1,500 on 14th October, 1962; (3) Rs. 2,500 on 24th October, 1962; and (4) Rs. 1,000 on 20th December, 1962.

The respondent further contended that he was entitled to appropriate these payments to the earliest amounts on the debit side of the appellant and interest thereon. Thus, after giving credit to the said sum, according to the respondent, a sum of Rs. 17,566.16 with interest upto and inclusive as on 7th September, 1965 was due and the respondent was entitled to recover the same from the appellant. The respondent also contended that the appellant was not an agriculturist entitled to any benefits under Madras Act IV of 1938. With reference to the question of limitation, the respondent pleaded that the appellant herein was in Malaysia during the several periods mentioned in the plaint that the appellant had written from Malaya, a letter on 9th Septebmer, 1957 acknowledging his liability and that at his request a *vaddi chittai* was furnished to him and that the appellant had promised to pay him.

2. The appellant-defendant in his written statement denied that there was an agreement to pay any interest. According to him in addition to the sum of Rs. 10,000 admittedly received by the respondent herein, the appellant had paid a further sum of Rs. 2,000 on 22nd January, 1954 and that sum together with the sum of Rs. 10,000 referred to above, discharged his entire liability to the respondent. He further contended that the suit was barred by limitation and that he was an agriculturist entitled to the benefits of Madras Act IV of 1938.

3. The respondent filed a reply statement denying the allegations contained in the written statement and reiterating the case put forth by him in his plaint.

4. On the basis of these pleadings, the following issues were framed by the trial Court;

"1. Whether the dealings between the plaintiff and the defendant were had as on a mutual, open and current account or as mere hand loan transactions ?

2. Whether the agreement for interest is true and to what amount of interest is the plaintiff entitled ?

3. Is the usage for interest true ?

4. Is the plaintiff not entitled to appropriate the payments as mentioned in para. 6 of the plaint ?

5. Whether the suit is in time by reason of the defendant's absence from India as claimed ?

6. Whether the defendant's letter dated 9th September, 1957 constitutes an acknowledgement of liability and is the suit in time thereby?

7. Is the payment of Rs. 2,000 on 22nd January, 1964 (SCC) pleaded by the defendant true?

8. Is the discharge of liability pleaded by the defendant true ?

9. Is the defendant an agriculturist entitled to any benefits under the Madras Act IV of 1938?

10. To what relief, if any, is the plaintiff entitled?"

5. The seventh issue was not considered by the trial Court as the respondent had taken an oath as challenged by the appellant herein and on that basis, that issue was answered in favour of the respondent herein: With regard to issue No. 9 the respondent did not press his contention that the appellant was not an agriculturist entitled to the benefits of Madras Act IV of 1938 and therefore that issue was answered in the affiramative and in favour of the appellant. On the other issues, the learned Subordinate Judge held that the parties had a mutual, open and current account, that there was agree-

ment between the parties to pay interest, that the interest was at the prevalent rate, that the respondent herein was entitled to appropriate the payments made by the appellant herein towards the earliest amounts on the debit side of the appellant, that the suit was in time, that the appellant's letter, dated 9th Septemer 1957 not only constituted an acknowledgement but also a fresh promise to pay and that the discharge of liability pleaded by the appellant was not true. In view of these findings, the learned Subordinate Judge by his judgment and decree, dated 9th March, 1967 decreed the suit for a sum of Rs. 12,000 being the principal with interest under Madras Act IV of 1938 from 20th December, 1962 being the date on which the last of the four payments referred to already was made by the appellant to the respondent herein. The learned Subordinate Judge arrived at this conclusion on the basis that the amount due to the respondent by the appellant as on 16th April, 1972 as per the ledger Exhibit A-2 maintained by the respondent was Rs. 22,874.36 made up of the principal of Rs. 12,000 and interest of Rs. 10,874.36 and that since the interest exceeded the payment of Rs. 10,000 the said payment should have been appropriated only towards interest to the knowledge of the appellant herein. Consequently, the learned Subordinate Judge held that the appellant was liable to pay the principal of Rs. 12,000 with interest at 5½ per cent per annum from 20th December, 1962. It is against this decree and judgment A.S. No. 408 of 1967, has been preferred by the defendant in the suit.

6. The trial Court itself has directed the appellant herein to pay the respondent a sum of Rs. 13,967.16 with interest on Rs. 12,000 at 6 per cent. per annum from 8th September, 1965 being the date of the plaint till realisation. Though the amount decreed against the appellant is Rs. 13,967.16 with subsequent interest at 6 per cent. per annum on Rs. 12,000 from the date of the suit, the appeal itself is confined only to a part of the decree, namely Rs. 6,562.27 and the disallowed portion of costs of Rs. 314.80. The appellant admitted his liability to the sum of Rs. 8,486-89 though he has given his own particulars as to how this admitted liability of Rs. 8,486.89 has been arrived at. However, the fact remains that it is not the entire decree passed by the trial Court that is appealed against and that the appellant has accepted his liability to pay a sum of Rs. 8,486.89, but disputed his liability only for the balance, namely, Rs. 6,562.27.

7. The respondent also has filed a memorandum of cross-objections claiming a sum of Rs. 3,599 being the difference between the sum of Rs. 17,566.16 for for which he prayed for a decree and the sum of Rs. 13,967.16 for which a decree has been granted.

8. During the pendency of this appeal, the Tamil Nadu Agriculturists Relief Act IV of 1938 (hereinafter referred to as the 1938 Act) has been amended by the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972 (Act No. VIII of 1973), (hereinafter referred to as the 1973 Act), which received the assent of the President of India on 19th January, 1973 and which was published in the Tamil Nadu Government Gazette dated 24th January, 1973. This Amending Act (1973 Act) has effected considerable changes in the 1938 Act to which references will be made subsequently in the course of this judgment. Based upon this amendment, the appellant has filed C.M. P. No. 7032 of 1973, praying that the appeal preferred by the appellant herein may be disposed of under the 1938 Act as amended by the 1973 Act. In the affidavit filed in support of this petition, the appellant stated that section 19 of the 1938 Act as amended by the 1973 Act provided that where before the publication of the 1973 Act in the Tamil Nadu Government Gazette, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor apply the provisions of the Act to such a decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908 amend the decree accordingly or enter satisfaction, as the case may be. The appellant contended in the said affidavit that he continues to be an agriculturist even under the amended Act and this averment happened to be made in view of the fact that to get the benefit of the 1973 Act, he must be an agriculturist as on 1st March, 1972. The respondent herein has filed a counter-affidavit in this petition. In paragraph 3

of his counter-affidavit, the respondent has stated that the allegation in paragraph 3 of the affidavit of the appellant that he continues to be an agriculturist is not admitted by him and that the question as to whether the appellant is an agriculturist under the Act as amended by the 1973 Act is yet to be determined on further materials and evidence. He has further contended that the decree debt is not liable to be scaled down under the Act as amended.

9. When the appeal was taken up for hearing, Mr. N. G. Krishna Ayyangar, learned Counsel for the appellant, contended that in view of the petition filed by the appellant requesting the Court to dispose of the appeal under the 1938 Act as amended by the 1973 Act, it was not necessary to canvass the correctness of the various conclusions reached by the trial Court, since the appellant was entitled to the relief on the basis of the 1973 Act amending the 1938 Act. Mr. G. Jagadisa Ayyar, learned Counsel for the respondent contended that the question whether the appellant herein continues to be an agriculturist under the 1973 Act has to be considered and determined and that for that purpose the matter has to be remanded to the trial Court. We are clearly of the opinion that this contention of the learned Counsel for the respondent is not sound. As we have pointed out already, before the trial Court, the respondent conceded that the appellant was an agriculturist under the 1938 Act notwithstanding the stand taken by him in the written statement that the appellant was not an agriculturist. In the affidavit filed in support of C.M.P. No. 7032 of 1973, the appellant stated that he continues to be an agriculturist even under the 1973 Act. Notwithstanding this specific averment, the respondent has not given any particulars with reference to which he denied the averment of the appellant. A vague and bald denial, that he (the respondent) is not admitting that the appellant herein is an agriculturist under the 1973 Act, does not justify an order of remand, as urged by the learned Counsel for the respondent. In view of the fact that the appellant was held to be an agriculturist under the 1938 Act and in view of the case of the appellant that he continues to be an agriculturist even under the 1973 Act, it is for the respondent herein to make out a *prima facie* case that the appellant herein does not continue to be an agriculturist under the 1973 Act. As a matter of fact, it is conceded before us that the appellant herein would not be an agriculturist under the 1973 Act only if he (1) had been assessed to income-tax under the Income-tax Act, 1961, or under the Income-tax Law in force in any foreign country in both the financial years ending 31st March, 1972; or (2) had in all the four half years immediately preceding the 1st March, 1972 been assessed to profession tax on a half-yearly income of more than one thousand two hundred rupees derived from a profession other than agriculture under the Tamil Nadu District Municipalities Act, 1920, the Madras City Municipal Corporation Act, 1919, the Cantonments Act, 1924, or any law governing municipal or local bodies in any other State or Union Territory in India or any foreign State in the continent of India or under the Madurai City Municipal Corporation Act, 1971, or under the Tamil Nadu Panchayats Act, 1958; or (3) had in all the four half-years immediately preceding the 1st March , 1972 been assessed to property or house tax in respect of buildings or lands other than agricultural lands under the Tamil Nadu District Municipalities Act, 1920, the Madras City Muncipal Corporation Act, 1919, the Cantonments Act, 1924; or any law governing minicipal or local bodies in any other State or Union Territory in India or under the Madurai Municipal Corporation Act, 1971 or under the Tamil Nadu Panchayats Act, 1958, provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs. 1,200; or (4) was a landholder of an estate under the Tamil Nadu Estates Land Act, 1908 or of a share or portion thereof, whether separately registered or not, in respect of which estate, share or portion any sum exceeding five hundred rupees is payable as peshkash or any sum exceeding one hundred rupees is payable under one or more of the following heads, namely, quit rent, jodi, kattubadi, poruppu or other due of a like nature, or is a janmi under the Malabar Tenancy Act, 1929, who is liable as such janmi to pay to the State Government any sum exceeding

five hundred rupees as land revenue. If the respondent in the counter-affidavit filed by him in C.M.P. No. 7032 of 1973 had at least stated that the appellant is not an agriculturist under the 1973 Act becuase he comes within one or more of the above enumerated cases, then for the purpose of ascertaining the correctness or otherwise of the said contention, we would have been justified in remanding the matter to the trial Court. In the absence of any such specific case put forward by the respondent herein, there is no justification whatever to remand the matter to the trial Court.

10 Mr. G. Jagadisa Iyer faintly contended that the question of vires of the 1973 Act may arise, though he himself did not state the grounds on which the said question would arise or has to be decided. Further, in the counter-affidavit filed by the respondent in C.M.P. No. 7032 of 1973, no such question has been raised. In view of this, we are of the opinion that there is no justification for considering any question of vires of the 1973 Act at this stage.

11. Under these circumstances no other objection having been taken by the respondent, we allow C.M.P. No. 7032 of 1973 and proceed to consider the case of the appellant with reference to the 1938 Act as amended by the 1973 Act.

12. Though the Judgment of the learned Subordinate Judge bristles with assumptions and abruptness of conclusions and observations, we do not propose to consider all of them in view of the fact that we have allowed C. M. P. No. 7032 of 1973, and we proceed to dispose of the appeal on the basis of the 1938 Act as amended by the 1973 Act. Even with reference to this, the only two sections which are relevant and material are sections 8 and 19 of the Act.

13. For the purpose of disposing of the appeal on that basis, the relevant facts are very simple and they are as follows: By 3rd December, 1953, the appellant owed a sum of Rs. 12,000 by way of principal to the respondent herein. That principal carried interest at different rates under agreement between the parties. During 1962, the appellant had paid a sum of Rs. 10,000 in four instalments to the respondent herein and the last of the said four instalments was paid on 20th December, 1962 The question for consideration is, what is the relief to which the appellant is entitled under the 1938 Act as amended by the 1973 Act, with reference to the above facts.

14. The 1938 Act was enacted to provide for the relief of indebted agriculturists in the then Province of Madras. Various provisions were made in that Act for such reliefs. Chapter II of that Act consisting of sections 7 to 14 makes provision for scaling down of existing debts and future rate of interest.

Section 7 of that Act provided:

> "Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this Chapter.
>
> No sum in excess of the amount as scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this chapter".

The other sections in this Chapter made provisions with regard to three kinds of debts. One is, debts incurred before 1st October, 1932 for the scaling down of which provision was made in section 8. The second is, debts incurred on or after 1st October, 1932, for the scaling down of which provision was made in section 9. The third is, debts incurred by an agriculturist after the commencement of the Act and the rate of interest payable by an agriculturist in respect of such debts was provided for in section 13 of the Act. Section 10 excepted certain cases from the scope of sections 8 and 9. Section 11 made provision as to costs decreed by a Court in certain cases. Section 12 statutorily fixed the rate of interest payable by an agriculturist on old loans. Section 13 fixed the rate of interest payable by an agriculturist on the debts

incurred by him after the commencement of the Act. Section 14 provided for separation of share of debt in particular cases with reference to a Hindu family. These provisions and their effect have been pithily summarised by a Full Bench of this Court in *Muthuswami Odayar* v. *Savarimuthu Udayar*[1], in the following terms:

"The Act is intended to afford relief to indebted agriculturists providing for scaling down all debts due by them either by wiping out the outstanding interest or reducing the rate of interest agreed to be paid by an agriculturist on loan contracted by him. The Act classifies the debts into three categories: (1) those incurred prior to the 1st October, 1932; (2) those incurred after the 1st October, 1932 but before 22nd March, 1938 the date of coming into force of the Act; (3) debts incurred subsequent to the date, namely after the coming into force of the Act. In regard to debts prior to the 1st October, 1932, all interest outstanding on 1st October, 1937 is completely discharged (*vide* section 8). Sub-section (2) to that section provides for the application of the rule of damdupat to such debts, that is, where a debtor has paid twice the amount of the principal whether by way of principal or interest, the entire debt is deemed to be discharged. The section contains other provisions for determining the amount repayable by a debtor coming under that section. In respect of the second category of debts, sections 9 and 12 provide the machinery for scaling down. The rate of interest is reduced to five per cent. per annum simple interest and the amount paid, notwithstanding its appropriation at the contract rate is reappropriated at this statutory rate of interest and the balance if any is adjusted towards principal: (Vide *Veeraraju* v. *Balakotiswara Rao*[2]) In respect of debts falling under the third category, that is those debts incurred after the Act came into force, the rate of interest is fixed by section 13 at 5½ per cent. per annum and it will not be open to the creditor to recover anything more".

Section 19 which occurs in Chapter IV of the Act dealing with "procedure and miscellaneous" provided:

"19. Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor".

For the purpose of this case, it is not necessary to refer to the other provisions of the Act. Even these provisions have undergone changes from time to time ever since the original enactment in 1938. As a matter of fact, section 19 itself has been amended by the Tamil Nadu Act XXIII of 1948 by making the provision extracted above as sub-section (1) of section 19 and by adding the following as sub-section (2) of that section:

"19 (2). The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement."

As we have pointed out already, substantial changes have been made to the 1938 Act by the 1973 Act. This 1973 Act has completely altered the three-fold classification of debts referred to above and classified all the debts due by the agriculturists into two classes, namely, debts incurred before the 1st March, 1972 and debts incurred on or after the

1. (1963) 1 M.L.J. 171: I.L.R. (1963) Mad. 271: 76 L.W. 63: A.I.R. 1963 Mad. 249 at 252.
2. I.L.R. (1951) Mad. 645: A.I.R. 1951 Mad. 67 (F.B.).

1st March, 1972. Consistent with this change made by the 1973 Act, section 7 of the Act also has been amended, which now reads as follows:

> "*Section* 7. Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist on the 1st March, 1972 shall be scaled down in accordance with the provisions of this Chapter.
>
> No sum in excess of the amount as scaled down shall be recoverable from him or from any land or interest in land belonging to him nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter".

Similarly in line with the change effected by the 1973 Act, section 19 has been amended and the amended section reads as follows:

> "*Section* 19 (1). Where before the publication of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, in the Tamil Nadu Government Gazette, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:
>
> Provided that all payments made or amounts recovered, whether before or after the publication of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, in the Tamil Nadu Government Gazette in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.
>
> (2) The provisions of sub-section (1) shall also apply to cases where, after the publication of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972 in the Tamil Nadu Government Gazette, a Court has passed a decree for the payment of a debt payable at such publication".

In view of this amended provision alone, the petition, C.M.P. No. 7032 of 1973 was made, since the decree against the the appellant was passed before the publication of the 1973 Act, in the Tamil Nadu Government Gazette.

15. Since the appeal involves the construction of the provision of section 8 of the 1938 Act as amended by the 1973 Act, we shall consider the section as it originally stood and the amendments that were made to it subsequently. Section 8 as originally enacted provided as follows:

> "*Section* 8. Debts incurred before the 1st October, 1932 shall be scaled down in the manner mentioned hereunder, namely:—
>
> (1) All interest outstanding on the 1st October, 1937 in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.
>
> (2) Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged.
>
> (3) Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable.
>
> (4) Subject to the provisions of sections 22 to 25, nothing contained in subsections (1), (2) and (3) shall be deemed to require the creditor to refund any sum which has been paid to him, to

increase the liability of a debtor to pay any sum in excess of the amounts which would have been payable by him if this Act had not been passed".

This section as originally enacted contained only an Explanation which dealt with the renewal of a debt, which is not relevant for the present case. One thing which can be immediately seen is that the section itself applied to debts incurred before the 1st October, 1932 and each one of the sub-sections (1), (2) and (3) had an independent operation, since each one of them could be worked and given effect to without reference to the other or others. Sub-section (1) wiped out all interest outstanding on the 1st October, 1937. Sub-section (2) provided that a debt shall be deemed to be wholly discharged if a debtor had paid to the creditor twice the amount of the principal, whether the said payment was by way of principal or interest or both. Sub-section (3) stated that where the sums so repaid fell short of twice the amount of the principal, such shortage, or the principal amount or such portion of the principal amount as was outstanding, whichever was smaller shall be repayable. Even though sub-section (1) has provided for the wiping out of the interest outstanding on the 1st October, 1937, still it did not have any real significance, in view of sub-section (4) which provided that nothing contained in sub-section (1) shall be deemed to require the creditor to refund any sum which has been paid to him. Since sub-section (2) takes in all payments made by a debtor, whether the same was by way of principal or interest or both, for calculating and finding out whether a debtor had paid twice the amount of the principal or not, the payment, if any, towards interest which has been wiped out under sub-section (1) will also have to be taken into account for the purpose of sub-section (2). One other thing to be noticed with regard to sub-sections (2) and (3) of this section is that all the payments made by a debtor to a creditor are taken into account for the purpose of finding out whether he has paid twice the amount of the principal or not, irrespective of whether the said payments were made towards the principal or towards interest or towards both. Therefore it is totally immaterial as to how the payments made by a debtor were appropriated by the creditor, namely, whether towards principal or towards interest or towards both, and whether the debtor has given any specific instructions with regard to the manner of appropriation or not. Since the section itself has not made any specific provision for the manner of appropriation by the creditor the law that was applicable was sections 59 to 61 of the Indian Contract Act. Section 59 of the Indian Contract Act enacts the rule in *Clayton's case*[1], that when a debtor makes a payment, he has a right to have it appropriated in such manner as he desires and the creditor who accepts the payment is bound to make the appropriation in accordance with the directions of the debtor. But when the debtor himself does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor, who can exercise that right at any moment, even at the time of the trial and section 60 embodies that rule and that is the rule in England as laid down in *Cory Bros. & Co.* v. *Owner of the Turkish Steamship "Mecca"*[2]. It is only when there is no appropriation either by the debtor or by the creditor, the appropriation has to be made as provided for in section 61 of the Indian Contract Act, namely, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits and if the debts are of equal standing, the payment shall be applied in discharge of each proportionately. It is this position that prevailed when the 1938 Act was enacted. As we have pointed out already, the actual appropriation made by a creditor with reference to the said provisions has no real significance in view of the fact that sub-sections 2 and 3 take in every payment made by a debtor to a creditor.

....We have already pointed out that section 8 (1) of the Act may not have any real significance, in view of sub-section 4 and as a matter of fact in relation to the appropriations already made, sub-section (1) of section 8 has no significance at all. But that sub-section may have

1. (1816) 1 Mer. 572.
2. (1897) A.C. 286 at 293.

significance, if the amount paid by a debtor remains unappropriated. As we have pointed out already, in the absence of any specific directions by the debtor at the time of payment, the right of appropriation devolves on the creditor, and he can exercise that right at any time and even at the time of the trial, as provided for in section 60 of the Indian Contract Act. But sub-section (1) of section 8 of the Act effected a change in this right of the creditor to make an appropriation under section 60 of the Indian Contract Act, if there had been no previous appropriation by him. Section 8 (1) of the Act having provided that all the interest outstanding on 1st October, 1937, shall be deemed to have been wiped out, the question arises whether payments which had remained unappropriated either by the debtor under section 59 of the Indian Contract Act or by the creditor under section 60 of the Indian Contract Act prior to 1st October, 1937, could thereafter, be appropriated by the creditor towards interest. However, in view of the provision in section 8 (1) of the Act that all outstanding interest on 1st October, 1937, shall be deemed to have been wiped out, it is not open to a creditor thereafter to exercise his right of appropriation and all such payments should be appropriated only towards the principal. That was the view taken by this Court in *Rayam Duraiswamy Aiyangar and others* v. *M. Raghavachariar*[1].

It was further held by this Court that payments made generally towards a debt or towards principal and interest, were liable on the above principle to be appropriated towards the principal after 1st October, 1937. Vide *Chittpragada Veeraraju and another* v. *Muppala Rayanim Dora Garu and others*[2] and *Kallakuri Venkateswarlu and others* v. *Kalidindi Narayanaraju and others*[3].

16. We may also point out that no scaling down of the debt is involved with regard to sub-section (2) because it simply provides that if all the payments made by a debtor are equal to or in excess of twice the amount of the principal the entire debt shall be deemed to have been wholly discharged. Consequently, the only question that will arise under sub-section (2) is to find out the principal amount and also to find out the total payments made by a debtor. If the said total payments are equal to or exceed twice the amount of the principal, nothing is due from the debtor. With reference to sub-section (3), if this calculation shows that the total payment falls short of twice the amount of the principal, then the shortage of the principal amount or such portion of the principal amount as is outstanding alone is repayable. Since the appropriation of payments made by a debtor is governed by sections 59 to 61 of the Indian Contract Act, depending upon the actual appropriation made by the creditor of the payments made by the debtor, either of the two figures contemplated by sub-section (3) may be smaller than the other.

17. As far as the present case is concerned, as we have pointed out already, the principal sum was Rs. 12,000 and twice the principal amount was Rs. 24,000 and the debtor had actually paid a sum of Rs. 10,000. Consequently, the payment made by the debtor falls short of twice the principal amount by Rs. 14,000. If the provisions had stood as they were and applied to the present case, the sum of Rs. 12,000 being the principal amount is smaller than twice the principal amount minus the actual payment, namely, Rs. 24,000 minus Rs. 10,000: Rs. 14,000 and consequently by virtue of sub-section (3) of section 8, the appellant herein would be liable to pay the said sum of Rs. 12.000 only with subsequent interest as provided for in the Act.

18. The provisions of this section were amended by adding two *Explanations* as *Explanations I and II* and making the existing *Explanation* as *Explanation III*, by the Amending Act XXIII of 1948 and we are concerned with *Explanation I* alone and that is as follows:

"In determining the amount repayable by a debtor under this section, every payment made by him shall be credited towards the principal, unless he has expressly stated in writ-

1. (1940) 2 M.L.J. 648: I.L.R. (1941) Mad. 57: A.I.R. 1941 Mad. 107.
2. (1940) 2 M.L.J. 758: A.I.R. 1940 Mad. 940.
3. (1946) 1 M.L.J. 272: A.I.R. 1946 Mad. 380.

ing that such payment shall be in reduction of interest."

The above amendment was necessitated by a Bench decision of this Court in *A. S. Duraiswamy Mudaliar and another* v. *Muhammad Amiruddin and others*[1]. In that case a sum of Rs. 5,400 was paid "in part payment of a decree debt in C.S. No. 500 of 1930." It was held by Sir Frederick William Gentle, C.J. and Bell, J., that the payment was liable to be appropriated first towards interest due under the decree and then towards the the principal. The learned Chief Justice stated:

> "The principle of law which always has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter the balance in respect of principal. That was recognised in two decisions under the Madras Agriculturists Relief Act, 1938, in *Ramaswami Aiyar* v. *Ramayya Sastrigal*[2], and in *Venkiteswara Aiyar* v. *Ramaswami Aiyar*[3]. In my view the recognised and acknowledged principle regarding the utilisation of a payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturists Relief Act, 1938".

In the two decisions referred to in the above extract, there had in fact been appropriations of the payments before the Act came into force. However, the decision itself dealt with a payment made after the Act came into force. But the larger principle laid down in this decision, namely, when there was no specific appropriation by either the debtor or the creditor, an inference of appropriation would arise under law and therefore the payments could not be reappropriated towards the principal under section 8 (1) of the Act ran counter to the earlier decisions of this Court holding that unless there was specific appropriation, the payment should be held to be open and such payments should be appropriated towards principal, as by the operation of

1. (1948) 1 M.L.J. 441: A.I.R. 1948 Mad. 434.
2. (1941) 1 M.L.J. 295: A.I.R. 1941 Mad. 571.
3. (1941) 1 M.L.J. 9: A.I.R. 1941 Mad. 403.

section 8 (1) of the Act, there would be no interest outstanding.

19. The *Explanation I* was introduced by the Amending Act XXIII of 1948 with the object of taking away the right of the creditor to appropriate payments towards interest unilaterally as he would be entitled to under section 60 of the Indian Contract Act and to nullify the effect of the decision of this Court in *A. S. Duraiswami Mudaliar and another* v. *Muhammad Amiruddin*[1], and to give legislative recognition to a principle which prior thereto rested on the force of judicial decisions. This position was so explained by a Full Bench of this Court in *Gerimella Suryanarayana* v. *Gada Venkataramana Rao*[2].

20. Whenever a debtor makes a payment as pointed out by the Judicial Committee in *Rama Shah* v. *Lalchand*[3]:

> "There are, indeed, four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal".

The effect of the above Explanation is thus to statutorily appropriate all payments made by a debtor to the creditor towards the principal amount except in the single case where the debtor has expressly stated in writing that such payment shall be in reduction of interest. It can be immediately seen that though the Explanation was introduced for the purpose of nullifying the principle laid down in *A. S. Duraiswami Mudaliar and another* v. *Muhammad Amiruddin and others*[1], its impact on sub-section (2) of section 8 is very limited. That is, with reference to the interest outstanding as on 1st October, 1937, if a debtor has not expressly stated in writing at the time when he made the payment that the payment shall be in reduction of interest and the creditor himself in his turn in exercise

1. (1948) 1 M.L.J. 441: A.I.R. 1948 Mad. 434.
2. I.L.R. (1953) Mad. 295: (1953) 1 M.L.J. 267: A.I.R. 1953 Mad. 458.
3. (1940) 1 M.L.J. 895: 51 L.W. 578: A.I.R. 1940 P.C. 63: 67 I.A. 160 at 173.

of his right under section 60 of the Indian Contract Act has not already appropriated the said payment towards the interest so outstanding, he cannot do so after the 1st October, 1937, since the interest outstanding as on that date has been wiped out. The Explanation has no further relevancy to section 8 (1) of the Act. The said Explanation has no impact on sub-section (2) of that section, since that sub-section merely concerns with the total payment made by a debtor to a creditor for the purpose of finding out whether the amount so paid is equal to or in excess of twice the principal amount and consequently the question of appropriation of payments either towards the principal or towards interest has no relevancy. Therefore, the Explanation has real and vital impact only on sub-section (3) of section 8, since the question of appropriation will arise with regard to that sub-section for the purpose of finding out whether it is the entire principal that is outstanding or portion of the principal that is outstanding and, if so, what portion. For this purpose, the sub-section even necessitates the reopening of the appropriation already made. Even with this Explanation, sub-section (3) can be given effect to in full.

21. We shall take an illustration. Suppose the principal amount is Rs. 1,000 and a sum of Rs. 1,500 by way of interest at the rate of 15 per cent. per annum for a period of ten years was outstanding. Suppose the debtor has paid a sum of Rs. 1,500 expressly stating in writing that the said payment was towards interest. In such a case, the difference between twice the amount of the principal and the actual payment of Rs. 1,500 is Rs. 500 and the entire principal of Rs. 1,000 is outstanding. As between them, the sum of Rs. 500 is smaller than the principal amount of Rs. 1,000 and consequently under sub-section (3) read with Explanation I, what is repayable to the creditor is only Rs. 500.

22. In the same illustration, if out of the sum of Rs. 1,500 paid by the debtor, he had paid Rs. 1,000 towards interest and Rs. 500 towards the principal, the difference between twice the amount of the principal and the total payment will be Rs. 500 and the principal outstanding will also be Rs. 500 and consequently with reference to sub-section (3) of section 8 the amount repayable will be Rs. 500.

23. Suppose again in the same Illustration, out of the sum of Rs. 1,500 paid by him, the debtor has paid Rs. 800 towards interest and Rs. 700 towards the principal, the difference between twice the amount of the principal and the total amount paid will be Rs. 500 while the portion of the principal outstanding will be Rs. 300 and the latter being smaller than the former, under sub-section (3), only the sum of Rs. 300 is repayable by the debtor.

24. Two things can be noticed in the illustration given above. One is, the creditor gets back the principal plus something more. The second is, even though the total amount repaid by a debtor is the same, depending upon the manner of appropriation, as between the two figures, namely, the difference between twice the amount of the principal minus the total payments, and the principal or such portion of the principal amount as is outstanding, either may be smaller than the other.

25. The 1973 Act has made a vital change in section 8. In the opening portion of the section, for the expression "1st October, 1932", the expression "1st March, 1972" has been substituted. Sub-section (1) of section 8 has been omitted. In sub-section (4) of section 8, reference to sub-section (1) has been omitted in view of the omission of sub-section (1) itself. In Explanation I, for the expression, "unless he has expressly stated" the expression "notwithstanding that he has expressly stated" has been substituted. The effect of this change is that this section applies to all debts incurred by an agriculturist before the 1st March, 1972 and the amended Explanation I stands as follows:

> "In determining the amount repayable by a debtor under this section, every payment made by him shall be credited towards the principal, notwithstanding that he has expressly stated in writing that such payment shall be in reduction of interest".

The effect of this Explanation is, to put an end to all the appropriations already made either with reference to sections

59 to 61 of the Indian Contract Act before the introduction of Explanation I, for the first time, to section 8 by the Amendment Act XXIII of 1948 or with reference to Explanation I to section 8 as introduced by the Amendment Act XXIII of 1948 and to statutorily and compulsorily appropriate all payments made by a debtor to a creditor only towards the principal. As a matter of fact, the appropriations already made have to be reopened for the purpose of applying the provisions of the Act and for finding out the amount repayable by a debtor.

26. The impact of this Explanation I as amended by the 1973 Act may now be considered. We have already shown that under sub-section (3) of section 8, whether before the introduction of Explanation I by the Tamil Nadu Act XXIII of 1948 or after its introduction, either of the two figures, namely, the difference between twice the amount of the principal minus all the payments made by a debtor and the principal amount or such portion of the principal amount as is outstanding can be smaller than the other. However, by virtue of Explanation I as amended by the 1973 Act, this position is completely changed. Since all payments made by a debtor to the creditor have now to be appropriated only towards the principal, the portion of the principal outstanding will always be smaller than the difference between twice the principal amount minus all the payments. In other words, the principal amount minus all payments will always be smaller than twice the principal amount minus the said payments. Sub-section (3) as it stands, contemplates the possibility of either of the two figures being smaller than the other. By virtue of the amendment made to Explanation I by the 1973 Act, this possibility is nullified, because the principal amount minus all payments will always be smaller than twice the principal amount minus all payments and therefore there is no chance of twice the principal amount minus all payments being in any case smaller than the principal amount minus all payments. In other words, the contingency contemplated by sub-section (3), namely that in some cases the difference between twice the principal amount minus all payments can be smaller than the principal amount or the portion of the principal amount outstanding becomes unreal and has no significance whatever in view of the amendment made to Explanation I by the 1973 Act.

27. As soon as we reached the above conclusion, we wanted to give an opportunity to the Bar as such to show whether any other interpretation is possible, since the question is a general one and is of considerable importance and concerns the interpretation of the relevant statutory provision as amended by the 1973 Act. Hence, we gave an opportunity to the members of the Bar to have their say on this question of construction of the relevant statutory provisions and adjourned the hearing of the case for that purpose. Pursuant to this opportunity afforded by us, Mr. Kothandarama Nainar, President of the Madras Advocates Association, Mr. P. S. Ramachandran and Mr. V. Sridevan appeared before us. Mr. Kothandarama Nainar submitted that no conclusion other than the one indicated by us already was possible. Mr. P. S. Ramachandran contended that the omission of sub-section (1) clearly showed that the Legislature did not intend to wipe out any portion of interest and therefore to construe the statutory provision in the manner indicated by us will not carry out the intention of the Legislature because a creditor would be receiving only the amount of principal and nothing towards interest at all. Mr. Sridevan in addition to putting forward the same contention wanted us to construe sub-section (3) as if it compares three figures, namely, twice the principal amount minus all payments, the principal amount and the portion of the principal amount outstanding and provides that the smaller of these three will have to be chosen.

28. In support of the contention of Mr. P. S. Ramachandran, a copy of the report and the proceedings of the Joint Select Committee on L. A. Bill No. 22 of 1972, that is, the Tamil Nadu Agriculturist Relief (Amendment) Bill, 1972 was produced before us. The said Bill in clause 6 thereof originally retained sub-section (1) of section 8 as it was in the 1968 Act except for two modifications, namely, the substitution of the expression as "1st October, 1966" for the expression "1st October, 1932" in the marginal

heading and in the opening portion, the expression "1st October, 1972" for the expression "1st October, 1937" in sub-section (1) of section 8. Explanations III and IV of section 8 were sought to be amended, but no amendment to Explanation I was proposed. But the Report of the Select Committee shows that the Select Committee was not in favour of discharging the entire interest outstanding, since that would result in agriculturists not getting sufficient credit facilities. Consequently, a decision was taken to omit sub-section (1) of section 8 and the Act itself dealing with only two categories of debts, namely, those incurred before and after 1st March, 1972. Similarly the report also shows that with the object that if the debtor had paid interest at exorbitant rate, such payment towards interest should be reopened and credited towards the principal. Explanation I was amended in the form in which it now finds a place, which has already been extracted. Mr. Ramachandran's argument is that when the Select Committee has amended the bill, as originally introduced, by deleting sub-section (1) of section 8, with the object of not wiping out the interest outstanding, to hold that a creditor will be entitled only to the principal amount advanced by him, which would be the effect of the amended Explanation I, as we have pointed out already, is not to give effect to the said intention of the Legislature. We are not able to accept this argument. We are of the opinion that the reports of the Select Committee cannot be taken into account by a Court as an aid to construction of statutes, though they may be referred to for ascertaining the conditions prevailing at the time when the statute was enacted and the purpose of making a particular amendment. The object of all interpretation is to discover the intention of the Legislature and the intention of the Legislature must be deduced from the language used, for it is well accepted that beliefs and assumptions of those who frame Acts of Parliament cannot make the law—Vide Maxwell on Interpretation of Statutes—12th Edition—page 28. As we have pointed out already, Explanation I has a real and vital impact on sub-section (3) of section 8 and as a matter of fact it is the key provision, and consequently Explanation I as amended cannot be ignored or thrown away in order to give effect to the assumed intention of the Legislature. Section 7 enacts a statutory mandate that all debts should be scaled down in accordance with the provisions contained in Chapter II of the Act. Similarly Explanation I to section 8 enacts a further command in determining the amount repayable by a debtor under section 8. In the light of these statutory commands, it is not open to any Court to ignore either of the two for the purpose of giving effect to such an assumed intention of the Legislature. The truth is when the Select Committee or the Legislature amended Explanation I to section 8 by enacting the 1973 Act, it failed to consider its impact on sub-section (3) of section 8. As we have pointed out in the course of this judgment, sub-section (3) of section 8 can be given effect to in full before the introduction of Explanation I by the Amending Act XXIII of 1948 and even after the introduction of the said Explanation. But only because of the amendment effected to Explanation I by the 1973 Act, one contingency contemplated by sub-section (3) of section 8 has become unreal and bereft of its significance. It may be that the Select Committee did not want to wipe out all outstanding interest. But the amendment of Explanation I has produced a totally unintended result and consequence of not only wiping out all interest but also adjusting even the amount already paid towards interest only towards the principal. Thus, this consequence is inevitable and we shall consider later whether there is anything in the principle or rule of interpretation of statutes which will militate against our taking such a view of the relevant statutory provisions. However, all that we are concerned in indicating at this stage is that apart from pointing out that the amended Explanation I has the effect of making one of the contingencies contemplated by sub-section (3) of section 8 unreal, Mr Ramachandran himself was not able to suggest any other construction which will give significance and reality to that contingency as well as effect and efficacy to the amended Explanation I.

29. With regard to the contention of Mr. V. Sridevan that section 8 (3) con-

templates a comparison between three figures, for two reasons we are not able to accept the same, apart from the fact that even the acceptance of such an argument will not solve the problem as to the effect of the amended Explanation I. The first reason is that if we hold that sub-section (3) of section 8 contemplates a comparison between three figures, we must assume that the Legislature contemplated that as between the two figures of the principal amount or a portion of the principal amount outstanding, either of them can be smaller than the other. On the face of it, such an assumption cannot be made for the simple reason that a portion of the principal amount will always be smaller than the principal amount. The second reason is that though the section refers to the three figures conjunctively by the use of the word, "or", when it states, "such amount only as would make up this shortage, *or* the principal amount *or* such portion of the principal amount as is outstanding", if really it intended a comparison between three different figures, instead of the expression, "whichever is smaller", the statute would have used the expression, "whichever is the smallest" and the actual use of the word "smaller" is in consonance and consistent only with the comparison of two figures and not more than two. We may point out that even Mr. Sridevan was not able to tell us what other construction of section 8 (3) read with the amended Explanation I is possible.

30. Under these circumstances, we have come to the inevitable conclusion that if the amended Explanation I is given effect to, as we ought to, with reference to sub-section (3) of section 8 of the Act, the principal amount alone in case no payment whatever has been made, will be repayable by a debtor, because that will be smaller than twice the principal amount and such portion of the principal amount as is outstanding alone will be repayable in case where some payments have been made and those payments have been appropriated towards the principal, since that portion of the principal amount will be smaller than twice the principal amount minus the said payments.

31. We shall now consider, whether the above conclusion of ours is opposed or contrary to or inconsistent with any recognised and settled principle or rule of construction of statutes.

32. Many must have been the occasions when the Courts in this country have echoed the feelings of Lord Dunedin:

> "My Lords, in common with all who have had to interpret statutes, I have frequently experienced difficulties which more careful draftsmanship might have obviated. But I confess that the clauses which in this case your Lordships have to interpret do for blundering English surpass anything I have hitherto seen." (Vide *Murray* v. *Commissioners of Inland Revenue*)[1].

Notwithstanding this the Court cannot shirk the responsibility of finding out what the intention of the Legislature was in enacting a particular piece of legislation, as gatherable from the language used therein and giving effect to it. The principle is that no Court can ignore or refuse to give effect to a particular statutory provision as unworkable.

33. As Lord Dunedin himself has pointed out in the very same decision:

> "It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a Judge to declare a statute unworkable."

34. Viscount Simon, L.C., declared in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[2].

> "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely

1. (1918) A.C. 541 at 552.
2. (1940) A.C. 1014 at 1022.

plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

It is these principles that were applied by the Privy Council in the construction of the somewhat complicated provisions of the Closer Settlement (Amendment) Act, 1907, emerging from the subsequent amendments, in *Pye and others* v. *Minister for Lands for New South Wales*[1]. The entire position in this behalf has been stated succinctly in Halsbury's Laws if England. 3rd Edn., Volume 36 at page 389 as follows:—

"If it is possible, the words of a statute must be construed so as to give a sensible meaning to them, *ut res magis valeat quam pereat*. A statute must, if possible, be construed in the sense which makes it operative, and nothing short of impossibility so to construe it should allow a Court to declare a statute unworkable. Thus where a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the Courts must decide what meaning the statute is to bear, rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty, unless the uncertainty cannot be resolved, and the provisions can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless.

Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman, unless such language is intractable."

35. Applying these principles to the present problem before us, we are clearly of the opinion that there is no escape from the conclusion which we have already reached. If at least two constructions are possible, there may be scope for the contention that the construction which will enable a creditor to realise the interest in addition to the principal should be preferred to the one which denies him any interest altogether, in view of the deliberate omission of sub-section (1) of section 8. As observed by Lord Reid in *Inland Revenue Commissioners* v. *Hinchy*[1].

"We can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament."

In this particular case, as we have pointed out already, no other construction which will simultaneously give effect to *Explanation I* as amended by the 1973 Act as well as to the entire language of sub-section (3) of section 8 was suggested, by any one appearing before us. Under such circumstances, only two alternatives are possible. One is to give effect to *Explanation I* as amended by the 1973 Act and to hold on that basis that under sub-section (3) a creditor will be entitled to the principal amount or such portion of the principal amount as is outstanding, because that is smaller than the difference between twice the principal amount minus the payments made by a debtor. The second is to ignore the amendment made to *Explanation I* by the 1973 Act altogether on the ground that if it is given effect to, it will wipe out all interest outstanding and such was not the intention of the Legislature inasmuch as it has deliberately omitted sub-section (1) of section 8. For the reasons

1. (1954) 3 All.E.R. 514.

1. 1960 A.C. 748.

already indicated by us, it is certainly not open to the Court to have recourse to the second alternative. As pointed out by us already, *Explanation I* constitutes the key provision in the application of sub-section (3) and it also constitutes a statutory command from which Courts have no escape. A statute must be construed so that the intention of the Legislature may not be treated as vain or left to operate in the air. If the second alternative referred to by us is adopted, the deliberate amendment to *Explanation I* made by the Legislature will have to be treated as in vain and sub-section (3) of section 8 has to be applied without reference to the said *Explanation I*, notwithstanding the fact that the said Explanation directly and vitally affects and controls the operation of sub-section (3) of section 8. After all, what exactly is the problem with reference to the impact of the amended Explanation I on sub-section (3) of section 8? As observed by Lord Porter in *Pye and others* v. *Minister for Lands for New South Wales*[1], referred to already,

> "Technically it presents some difficulty, but, in practice, no actual difficulty has been encountered."

The theoretical construction of sub-section (3) leads to the inference that the Legislature contemplated either of the two figures compared therein being smaller than the other. But the operation of the amended *Explanation I* is to make one figure always smaller than the other. Consequently, the actual working of the said sub-section along with the amended *Explanation I* does not give rise to any difficulty and it produces, a definite, clear and effective result. Therefore, we are of the opinion that the result we have reached is the only result that is possible, having regard to the language of the amended *Explanation I* and its mandatory character.

36. It is pertinent to point out one other circumstance as well. In our opinion it is rather difficult to hold that in effect the 1973 Act makes an amendment to the 1938 Act in these matters though in form it is an amendment. As we have pointed out already, the 1938 Act classified the debts into three categories, while the 1973 Act classifies the debts into two categories and there is no correspondence and correlation between the categories dealt with and provided for in the 1938 Act and those dealt with and provided for in the 1973 Act. The provisions of section 8 of the 1938 Act dealt with debts incurred before 1st October, 1932, while the provisions of section 8 of the 1938 Act as amended by the 1973 Act deal with debts incurred before 1st March, 1972. Consequently, section 8 of the 1938 Act as amended by the 1973 Act constitutes a new legislation with reference to all debts incurred by an agriculturist prior to 1st March, 1972. This conclusion is re-inforced by the fact that the Tamil Nadu Legislature has enacted an independent Act, namely, the Tamil Nadu Debt Relief Act (XXXVIII of 1972). Section 7 of tha Act enacts section 8 of the 1938 Act as amended by the 1973 Act as a separate and independent provision applicable to all debts incurred before 1st March, 1972 by a debtor as defined in that Act. The bill which resulted in that enactment, namely, L.A. Bill No. 21 of 1972 was considered along with L.A. Bill No. 22 of 1972 which became the 1973 Act. In view of the provision of section 7 of that Act being identical with the provision of section 8 of the 1938 Act as amended by the 1973 Act, it cannot be contended that any difficulty presented by section 8 of the 1938 Act as amended by the 1973 Act is due solely to the fact of the amendment.

37. Now coming to the facts of the present case, we have already pointed out that on the date when the suit was instituted by the respondent herein, the appellant had repaid a sum of Rs. 10,000 as against the principal of Rs. 12,000 and if the 1038 Act had applied to the debt in question on the date of the suit, the difference between twice the principal amount minus the payment of Rs. 10,000, namely, Rs. 14,000 being bigger than the principal amount of Rs. 12,000, the appellant would be liable to pay only the smaller of the two, namely, Rs. 12,000. However, section 8 of the 1938 Act becomes applicable to the appellant only by virtue of the amendment of 1973, which, as we have already pointed

1. (1954) 3 All.E.R. 514.

out, was published in *Tamil Nadu Government Gazette* on 24th January, 1973. By that time, the appellant herein had paid to the respondent a further sum of Rs. 8,486-89, because he admitted his liability to that amount and the said amount is not the subject-matter of the present appeal. Consequently, by the time the 1973 Act came into effect, the appellant had paid a sum of Rs. 18, 486-89. If this amount is appropriated towards the principal, as provided for in *Explanation I* as amended by the 1973 Act, the appellant has paid a sum of Rs. 6,486-89 in excess of the principal and therefore no part of the principal is outstanding as on the date of the publication of the 1973 Act in the *Tamil Nadu Government Gazette*. Consequently, no further amount is payable by the appellant to the respondent herein. By virtue of sub-section (4) of section 8 of the Act, the appellant will not be entitled to a refund of this excess sum paid by him.

38. Mr. N. G. Krishna Ayyangar wanted to put forward a contention that sub-section (4) of section 8 will not cover this excess amount, as it was paid under orders of this Court. For this purpose he relied on the orders of this Court dated 30th May, 1967, made in C. M. P. No. 6617 of 1967. In that petition, notwithstanding the fact that the appellant had not preferred the present appeal against the entire decree amount, but only against a part of the decree amount, he had prayed for stay of the execution of the entire decree in O. S. No. 50 of 1965 on the file of Sub-Court, Devakottai. It is only with reference to such petition, this Court passed an order to the effect that on the petitioner (appellant herein) depositing a sum of Rs. 8,486-49 (being the admitted amount) within the time stipulated therein and on furnishing security for the balance of the decree amount, there would be stay of execution of the decree. Even if this Court had not passed any order with reference to the said sum of Rs. 8,486-89, the appellant could not have withheld that amount from the respondent herein, because the said amount not being the subject matter of the appeal could have been recovered by the respondent by executing the decree. As a matter of fact, under Order 41, rule 5 of the Code of Civil Procedure, this Court could not have granted any stay of execution of the decree with reference to the said amount, the same not being the subject-matter of any appeal. Consequently, we are unable to accept the contention of Mr. Krishna Ayyangar that the fact that this Court made reference to the said sum in the order passed by it in C.M.P. No. 6617 of 1967 makes any difference, when the said amount was paid by the appellant herein to the respondent in discharge of his admitted liability.

39. Under these circumstances, we allow the appeal and modify the decree of the trial Court in O.S. No. 50 of 1965 by confining it only to a sum of Rs. 8,486-89, which has already been paid by the appellant to the respondent. We also record satisfaction of that decree. Since we have allowed the appeal, the memorandum of cross-objections has necessarily to fail and the same is dismissed. We further direct that the parties to this appeal and cross-objections, shall bear their respective costs both here as well as in the trial Court.

40. We place on record our appreciation of the assistance rendered by Mr. Kothandarama Nainar, Mr. P. S. Ramachandran and Mr. V. Sridevan, Advocates.

S.J. —— *A.S.* 408 *allowed*; *Memo of Cross Objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam, J.*

Ganapathy Naicker and another .. *Petitioners**

v.

The Special Officer for Wakfs, Madras-4. .. *Respondent.*

Wakf Act (XXIX of 1954) as amended by Central Act (XXXIV of 1964), sections 36-A and 36-B—Mortgage of Wakf properties —Mortgage after the Amendment Act—No previous sanction of the Board obtained—Mortgagees can apply for sanction to the Board.

In cases where properties belonging to a wakf are mortgaged, after the 1964

*C.R.P. Nos. 696 and 697 of 1971.
8th March, 1972.

amendment to the Wakf Act, without obtaining the sanction of the Wakf Board, it is open to the mortgagees to apply subsequently to the Board for according sanction. If the mortgagees fail to obtain such sanction, then the provisions of section 36-B of the Wakf Act will come into operation. By the amendment to the Act introducing section 36-A to the Act, all that was intended was to accord statutory recognition to the provisions of Mohammadan Law by which before a transfer of wakf property can be made, sanction of the Court should be obtained. It is for the Board to consider the circumstances and grant sanction or refuse to grant it.

[*Para.* 2.]

Case referred to :—

P. S. Abdul Kadir v. *The Maharathul Kadiria Sabha*, (1952) M.W.N. 941: 65 L.W. 1011 : (1952) 2 M.L.J. 657 : I.L.R. (1953) Mad. 597 : A.I.R. 1953 Mad. 143.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chingleput, dated 24th December, 1970 and made in C.M.A. Nos. 93 and 94 of 1968 (RC. No. 27985/68/A-1/and RC. No. 47232-/67-A1 respectively on the file of the Collector of Chingleput at Kancheepuram.

R. Sundaravaradan, for Petitioner.

M. A. Sathar Sayeed, for Respondent.

The Court delivered the following

JUDGMENT.—The petitioners are the usufructuary mortgagees of wakf properties. One item of the property was mortgaged on 8th April, 1965 for Rs. 1,000 and another on 11th January, 1968 for Rs. 2,000. Subsequent to the passing of the amendment to the Wakf Act, 1954, section 36-A provides that:

> "Notwithstanding anything contained in the wakf deed, no transfer of any immoveable property of a wakf by way of
>
> (*i*) sale, gift, mortgage or exchange; or
>
> (*ii*) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building, shall be valid without the previous sanction of the Board".

2. It is common ground that though the Act came into force in 1964 and the two transactions in question were in 1965 and 1968, previous sanction of the Board was not obtained. The contention of the learned Counsel for the petitioners is that by this amendment, all that was intended was to accord statutory recognition to the provisions of Mohammadan Law by which before the transfer of wakf property could be made, sanction of the Court should be obtained. In a case is which the sanction of the Court was not obtained before actual transfer, a Division Bench of this Court has held in *P. S. Abdul Kadir* v. *The Maharathul Kadiria Sabha*[1], that the sanction can be obtained subsequent to the transaction on valid grounds. I agree with the contention of the learned Counsel for the petitioners that the intention of the Legislature was to codify the provisions of the Mohamedan Law before the amendment in section 36-A. In this view, it is open to the petitioners to apply to the Board for sanction regarding the two alienations. If the petitioners fail to obtain such sanction then the provisions under section 36-B will come into operation. It is also admitted that the procedure under section 36-B (2) has not been complied with in that notice has not been given to the petitioners. In the circumstances, the proper order to make is to allow the petitions and direct the petitioners to apply to the Board for sanction. It is for the Board to consider the circumstances and grant sanction or refuse to grant it. In the event of the Board refusing to grant the sanction, the Board will be at liberty to take proceedings under section 36-B. The petitioners are granted two months time from this date for moving the Board for sanction under section 36-A. The Civil Revision Petitions are allowed.

V.S. ——— *Petitions allowed.*

1. (1952) 2 M.L.J. 657: I.L.R. 1953 Mad. 597: 1952 M.W.N. 941 : 65 L.W. 1011 : A.I.R. 1953 Mad. 143.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

M. J. Xavier .. *Appellant**

v.

N. Chidambaram, Deputy Secretary to Government of India, New Delhi and another .. *Respondents.*

Arbitration Act (X of 1940), *section* 30 (a)—*Arbitration—Award—Petition to set aside—Termination of contract—Reference to Arbitration—Arbitrator whether misconstrued the terms of the contract—Enquiry by Arbitrator—Scope of—Error of law—When ground for relief.*

Unless a person is in a position to show that there is any error of law on the face of the award or any document attached to the award, he cannot succeed in establishing that there is error of law on the face of the record resulting in legal misconduct. [*Para.* 2.]

In deciding a dispute as to whether a person was entitled to damages for termination of a contract, the question whether the termination was wrongful or not might be relevant. But the mere fact that the arbitrator has not said anything specifically as to whether the termination was wrongful or not, does not mean that the arbitrator has failed to determine the matter in dispute. It is not necessary for an arbitrator to give reasons in support of his finding. [*Para.* 3.]

Case referred to:—

Santa Sila v. Dhirendra Nath, (1964) 3 S.C.R. 410: A.I.R. 1963 S.C. 1677.

Appeal against the order of the City Civil Court (Second Assistant Judge), Madras, dated 30th September, 1964 in O.P. No. 2 of 1962.

K.C. Duraiswami for *Row* and *Reddy* and *N.P. Subbayya,* for Appellant.

S.A. Ali Mohamed, Junior Standing Counsel for Central Government, for 2nd Respondent.

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*A.A.O. No. 216 of 1965. 27*th February,* 1973.

The Order of the Court was made by

Ramaswami, J.—This Civil Miscellaneous appeal is against the dismissal of a petition to set aside an award under section 30 of the Arbitration Act. The appellant before us had entered into a contract with the President of India for collecting, conveying and delivering parcels, etc., from or to Madras Central Railway Station Goods Shed and other places. Clause 22 of the contract provided that all matters in dispute between the parties shall be referred to arbitration as mentioned therein. The contract was terminated by the Union of India at a particular stage. The dispute between the parties related to amounts due to the appellant before us in respect of work already done and the claim of damages that he made on the ground that his contract had been wrongfully terminated by the Union of India. Admittedly, these matters were referred to arbitration, and the Arbitrator gave his award dated 14th August, 1961. In that award, the Arbitrator said that the appellant is entitled to monies at a particular rate regarding certain bundles that he handled and at a different rate in respect of certain other articles that he handled and further held that the appellant was not entitled to any damages on the ground of termination of the contract. He also found that the security deposit made by the appellant with the Union of India shall be refunded to him. However, he did not allow any interest for the amounts awarded to the appellant in respect of work which he had already done. The Arbitrator filed the award in Court (City Civil Court, Madras) and his petition came to be registered as a suit. On notice being given to the respective parties of the filing of the award in Court, the appellant filed O.P. No. 2 of 1962 on the file of that Court under section 30 of the Arbitration Act praying for the setting aside of the award on several grounds. The Second Assistant Judge, City Civil Court, Madras, dismissed the petition holding that there were no grounds to set aside the award and granted a decree in favour of the appellant in terms of the award. Not satisfied with that, the appellant has filed the present civil miscellaneou appeal.

2. The learned Counsel for the appellant contends that the Arbitrator has mis-

construed the terms of the contract in fixing the rate in respect of the packages handled by the appellant and that amounted to legal misconduct as contemplated under section 30 (*a*) of the Arbitration Act. The second argument of the learned Counsel is that the Arbitrator had failed to decide certain questions that had been referred to him and that, therefore, the award is invalid and liable to be set aside. After hearing the learned Counsel, we are satisfied that neither of the grounds urged by the learned Counsel is available to him. The Arbitrator has not given any reasons in his award in coming to the conclusion regarding the rate at which the appellant is entitled to claim in respect of packages handled by him. Therefore, there is absolutely no force in the contention that the finding of the Arbitrator regarding the rate is an error of law on the face of the record. We do not see any force in the contention of the learned Counsel that the Arbitrator has really made out a new contract for the parties and that the finding of the Arbitrator regarding the rate cannot be supported on the terms of the contract. Though it appears that the appellant had urged before the lower Court that the Arbitrator had misconducted himself, such an argument is not put forward before us. The only contention as far as this point is concerned is that there is legal misconduct, in that the Arbitrator misconducted the proceedings. Unless the appellant is in a position to show that there is any error of law on the face of the award or any document attached to the award, he cannot succeed in establishing that there is error of law on the face of the record resulting in legal misconduct. Therefore, on the first point raised the appellant should fail.

3. The second point is also without any merits. As we said, the matters referred to the Arbitrator for his decision were as to what amount the appellant is entitled in respect of work already done by him and what, if any were the damages payable to the appellant in respect of termination of the contract. The Arbitrator has given specific findings with regard to these matters. As already noted, the Arbitrator has found that in respect of certain packages the appellant should be paid at a particular rate and in respect of certain other packages he shall be paid at a different rate. That answers the first matter in dispute, namely, what amount was due to the appellant in respect of the work already done by him. Regarding the only other matter in dispute, namely, whether the appellant is entitled to damages for termination of the contract, the Arbitrator has given a specific finding that the appellant is not entitled to any such damages. However, the learned Counsel contends that in the statement filed before the Arbitrator a specific question as to whether the termination of the contract was wrongful or not had been raised and this question has not been specifically answered by the Arbitrator. It is contended that the failure of the Arbitrator to answer such a question makes the award invalid. We are unable to agree. The learned Counsel referred to a passage in Halsbury's Laws of England, Third Edition, Volume 2, at page 57, wherein it is stated that if the Arbitrator fails to decide all matters referred to him, it would amount to "misconduct". But this does not help the learned Counsel in this case, for, as we said earlier, the Arbitrator has not failed to decide any of the matters referred to him. In deciding the dispute as to whether the appellant was entitled to damages for termination of the contract, the question whether the termination was wrongful or not might be relevant. But the mere fact that the Arbitrator has not said anything specifically as to whether the termination was wrongful or not, does not mean that the Arbitrator has failed to determine the matter in dispute. It is needless stress that the matter in dispute was not whether the termination was wrongful or not though it may be a relevant issue, but whether the appellant was entitled to damages for the alleged wrongful termination. This matter has been specifically decided by the Arbitrators and this covers the issue of termination being wrongful or otherwise. In *Santa Sila* v. *Dhirendra Nath*[1], one of the disputes between the parties was whether one of the parties was entitled to an account from the other party. That dispute had not been specifically decided by the Arbitrator. But the award was a compendious one deciding as to how much a particular party is entitled. The Supreme Court observed at page 1680, column 2, (Paragraph 10):

1. (1964) 3 S.C.R. 410 : A.I.R. 1963 S.C. 1677.

"Before dealing with this point it is necessary to emphasise certain basic positions. The first of them is that a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal........Besides it is obvious that unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference."

Therefore, it is clear that even regarding the matters in dispute there need not be separate findings unless the matter is specifically referred to in the arbitration reference. In the present case, of course, the dispute as to whether the appellant is entitled to damages for the alleged wrongful termination of contract has been specifically referred to. But the fact remains, the Arbitrator has given a finding regarding this dispute, though he has not supported his finding with reasons. It is not necessary for an Arbitrator to give reasons in support of his finding. Under these circumstances, the contention of the learned Counsel that the arbitration award suffers from the defect of failure to decide a matter that had been referred to arbitration fails. We see no merit in the civil miscellaneous appeal, and the same is dismissed. But, in the circumstances, there will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam and N.S. Ramaswami, JJ.*

Mrs. Sydney Victor by guardian and Power Agent D. Jacob Anandaraj and another .. *Appellants**

v.

Janab S. Kadar Sheriff and others .. *Respondents.*

(A) *Motor Vehicles Act (IV of* 1939), *section* 110-*A—Motor Accident—Bus and lorry—Collision—Negligence of lorry driver—Injured a passenger in the bus—Injured gripping window-cross bar—Right thumb outside the bar—Severance as a result of the collision—Compensation—Holding the thumb—If contributory negligence.*

It is true that putting out the hand or any other part of the body outside a fast-moving vehicle would be a negligent act, particularly if the vehicle is moving in a crowded place. In a busy city where there is heavy traffic, it would certainly be highly dangerous to put out the hand or arm or other part of the body so as to be projecting outside the moving vehicle. [*Para.* 11.]

Even such putting out a part of the body outside the moving vehicle may not be an act which endangers the safety of the person concerned, if the vehicle was not moving in a crowded place but it was moving only in a broad highway, for in such highway, there is no reasonable possibility of any other vehicle coming very close to the vehicle in which the person is travelling. [*Para.* 11.]

Mere gripping of the window cross bar in a position in which the right thumb was gripping the bar on its outer side would not be a negligent act on the part of the injured especially when the vehicle was on a broad highway and not moving in any crowded place. [*Para.* 11.]

Held on facts, by merely gripping the window cross-bar, the injured did not show a lack of reasonable care for her own safety. Further the fact that the injured

* A.A.O. Nos. 432 and 438 of 1969
14th March, 1973.

was gripping the window cross-bar had nothing to do with the actual collision. There woud be no contributory negligence. [*Para.* 12.]

(B) *Motor Vehicles Act* (*IV of* 1939), *section* 110-A—*Motor Accident—Bus and lorry—Collision-Injured, a passenger in the bus—Right hand of injured gripping the window bar—Severance of thumb in the collision—Injured employed as teacher — Compensation — Quantum.*

The Tribunal found that the severance of the right thumb did not incapacitate the injured to such an extent that she cannot earn in the future. She was a teacher getting Rs. 125 per month as salary and she was also earning Rs. 30 to Rs. 35 per month by way of private tuition. She was not discharged from service due to this injury. She was aged 54 years on the date of the accident. The compensation was reduced to Rs. 5000 from Rs. 8000 (awarded by the Tribunal). [*Para.* 17.]

(C) *Motor Vehicles Act* (*IV of* 1939), *section* 110-*A*—*Motor Accident—Bus and lorry—Collision—Injured girl, a passenger in the bus—Injuries in the head—Fracture of frontal bone—No permanent disability—Compensation—Quantum.*

The injury in the head though involved the fracture of the frontal bone, did not cause any permanent disability. It was stated in evidence that it has left a permanent scar which disfigured the face of the girl; she was treated as in-patent for 15 days and as out-patient for two weeks; that even after such treatment she was complaining of head-ache and also had been fainting often, that her facial beauty was affected and she had become ugly and that she could not continue her studies. The Tribunal awarded Rs. 25,000. It was reduced to Rs. 15,000 as the injury had not left any permanent disability. [*Para.* 18.]

Cases referred to:—

Davies v. *Swan Motor Co., Ltd.*, (1949) 1 All E.R. 620; *Nance* v. *British Columbia Electric Railway Co.*, (1951) 2 All E.R. 448; *Harris* v. *Toronto Transit Commission*, 1968 A.C.J. 264; *Rajammal* v. *Associated Transport Co.*, 1970 A.C.J. 44; *Yoginder Paul Chowdhry* v. *Durga Dass Punj*, 1972 A.C.J. 483.

Appeals against the order of the Court of the Motor Accidents Claims Tribunal (Principal Subordinate Judge, Chingleput) dated 9th September, 1968 and made in M.C.O.P. No. 54 of 1967 and M.O.P. No. 53 of 1967 respectively.

S.A. Rajan, for Appellant.

A. Devanathan, for Respondents.

The Order of the Court was made by

N.S. Ramaswami, J.—These two Civil Miscellaneous Appeals arise out of two claim petitions in respect of one and the same motor accident. On 7th February, 1967 at about 5-30 P.M., there was a collision between the bus bearing registration No. MDJ. 3705 and the lorry bearing registration No. MSW 234 near milestone 43 in Madras-Bangalore Road. In that accident, Mrs. Sydney Victor, a school teacher at Madras, and Miss. Chandra, a girl aged about 16 years, who were two of the passengers travelling in the bus, were injured. On behalf of Mrs. Sydney Victor, M.O.P. No. 54 of 1967, was filed and on behalf of Miss Chandra M.O.P. No. 53 of 1967, was filed before the Motor Accidents Claims Tribunal, Chingleput. In the two petitions, the owner of the bus was impleaded as the first respondent, the owner of the lorry was impleaded as the 2nd respondent and the insurance company, which is common to both the vehicles, was impleaded as the 3rd respondent. The Tribunal held that the accident was as a result of rash and negligent driving of the lorry MSW. 234, that the two injured *viz.*, Mrs. Sydney Victor and Miss Chandra, were entitled to compensation of Rs. 8,000 and Rs. 25,000 respectively, but that both of them were guilty of contributory negligence, so much so the quantum of compensation so arrived at was reduced by 50 per cent. in each case. The result was Mrs. Sydney Victor was granted an award for only a sum of Rs. 4,000 and Miss Chandra was given only Rs. 12,500. In these two appeals the two respective injured question the finding of the Tribunal below regarding the alleged contributory negligence on their part. Therefore the main question would be whether the two injured or either of them were guilty of contributory negligence.

2. That the driver of the lorry MSW. 234, drove his vehicle rashly and negligently

and brought about the accident is not in dispute now. However, in order to appreciate the contention regarding the question of contributory negligence on the part of the two injured, the facts relating to the accident have to be stated. The bus in question was travelling from Vellore towards Sriperambudur in the Bangalore-Madras Road. A party of 10 persons had boarded this service bus at Vellore, and the two injured, Mrs. Sydney Victor and Miss. Chandra, were two members of the abovesaid group of 10. The road runs east to west and the bus was proceeding from west towards east. The time was then about 5-30 P.M. The lorry in question came from the opposite direction. A bullock cart was going ahead of the lorry. The lorry overtook the bullock cart when the bus was approaching the spot from the opposite direction and in that process went to the offside of the road. Because of the broadness of the road, there was no head-on collision between the lorry and the bus in spite of the lorry going to the offside of the road. The two vehicles were passing each other, but while so passing, the right side cabin portion of the lorry hit against the rear portion of the right side of the bus. Mrs. Sydney Victor, who has given evidence as P.W. 1 (hereinafter referred to as P.W. 1), was sitting in the last but one seat, which seat was facing the rear. She was sitting close to the window of the bus. Miss. Chandra (she has not given evidence) was sitting just opposite P.W. 1 (*i.e.*) in the last seat which is facing the front and she was also close to the window. As it was that part of the bus, *viz.*, rear portion of the right side of the bus where the two injured were sitting which was hit by the lorry, they were injured. P.W. 1's right thumb was completely severed. She had not received any other injury. Miss. Chandra had received injuries on her head and there was fracture of the frontal bone.

3. In the claim petitions it has been alleged that the drivers of both the vehicles were rash and negligent in driving their respective vehicles. But there was nothing to show that the bus driver drove his vehicle either rashly or negligently. That is the finding of the Tribunal below and that is accepted by all the parties. As we said, the further finding of the Tribunal that the lorry driver drove his vehicle in a rash and negligent manner in that he went to the offside of the road when there was traffic from the opposite direction and brought about the accident, is also accepted by all the parties. But the owner of the lorry and the insurance company have successfully contended before the Tribunal below that P.W. 1 and the other injured, Miss. Chandra, were guilty of contributory negligence. Their case is that while P.W. 1 had been holding the cross-bar of the window of the bus with her right hand, in which process her right thumb was outside the bus, Miss. Chandra was resting her head over the window bar of the bus, so much so the head was projecting outside the window and that these acts on the part of the respective injured amounted to contributory negligence on their part. This has been accepted by the Tribunal below. First of all, we have to see what happened factually.

4. From the evidence on record, we are satisfied that P.W. 1 had, as a matter of fact, been holding the cross-bar of the window in the bus with her right hand and the right thumb should have been gripping the cross-bar on its outer side. We are equally satisfied that the case of the owner of the bus and the insurance company that the head of Chandra was projecting outside the window of the bus at the time of the impact is not true and that she should have been having her head well within the bus and in spite of that, she has been injured as a result of the impact between the two vehicles. P.W. 1 (one of the injured) and Jacob Anandaraj (P.W. 3) are the two persons who speak about the accident on behalf of the claimants. Doraisami (R.W. 1) the driver of the bus, and Akbar Hussain (R.W. 2) the conductor of the bus, have given evidence on behalf of the respondents. The driver of the lorry had been prosecuted for an offence under section 338, Indian Penal Code, and he had admitted guilt before the criminal Court and he had been fined. But subsequently he died and so he was not available when the matter came up for trial before the Claims Tribunal.

5. P.W. 3 was one among the group of 10 which was travelling from Vellore in that bus. He is related to P.W. 1 as

well as to Miss. Chandra. This witness was seated in the long seat running to the length of the bus on its left side. So he was facing south while the bus was moving eastwards. P.W.1, who was sitting in the last but one seat, was facing west (while the bus was moving east) as that seat is one which faces the rear of the bus. Miss. Chandra (who has not been examined) was facing east. As we said earlier, P.W. 1 and Miss. Chandra were sitting close to the last window of the bus on its right side. Though P.Ws. 1 and 3 would say that P.W. 1 was not holding the cross-bars of the window at the time of the impact, from the very nature of the injury and other circumstances of the case, we are satisfied that she should have been so holding the bar. P.W. 3 is the person who gave the report about the accident as per Exhibit A-3. In that report, he has categorically stated that P.W. 1 had been holding the cross-bars of the window of the bus with her right hand. P.W. 1 had no other injury except the severing of the right thumb. It appears to us that because P.W. 1 was gripping the cross-bar of the window with her right hand, (though her left hand would be the one nearer to the window than the right hand), the right thumb should have been on the outer side of the bar and when the cabin portion of the lorry hit against the bus, particularly at the rear portion of the right side of the bus, the right thumb of P.W. 1 which was on the outer side of the cross-bar, had been completely severed. As a matter of fact, P.W. 3 says in chief-examination itself that P.W. 1's thumb was picked up from the road. That could have been so, only if the right thumb was on the outer side of the cross-bar. Otherwise there is no chance of the thumb being not only completely severed but also falling outside the bus.

6. However, the case of the owner of the lorry and the insurance company that Miss. Chandra was having her head in such a position so that part of it was outside the window, is wholly unacceptable. The window has admittedly three cross-bars with an interval of 4 inches from each other. That means, the cross-bars would be covering for one foot from the lower edge of the window. The gap between the third (topmost) cross-bar and the top of the window is said to be 12 inches. It is contended on behalf of the owner of the bus and the insurance company that Miss. Chandra ought to have been resting her head over the third cross-bar so that her head had been protruding out through the one foot interspace between the third cross-bar and the top of the window. We are of the opinion that it would be wholly impossible for any one to put out the head through the above interspace while sitting in the seat, considering the height of the top of the window in relation to the seat. If one has to put his or her head outside through the interspace between the third cross-bar and the top of the window, we think he or she has to stand and while sitting in the seat of the bus the head cannot reach the position to rest over the third cross-bar. This apart, there is no acceptable evidence to show that Miss. Chandra had been resting her head over the third cross-bar and thereby protruding her head outside the window. Miss. Chandra has not been examined before the Tribunal below and the explanation is that even by the time when the matter was taken up for trial, she was not well due to the head injury which she had received. Her father has given evidence as P.W. 4. But he was not one of the persons who travelled in the bus at the time of the accident. He speaks only about the nature of the treatment given to his daughter and her condition. P.Ws. 1 and 3 are not in a position to say how exactly Miss. Chandra came to be injured on her head in the accident.

7. R.Ws. 1 and 2, the driver and the conductor of the bus, have tried to make out that Chandra was having her head over the cross-bars and the head was protruding out. The evidence of R.W. 1, the driver, has to be completely eschewed regarding this aspect because it is impossible for him to have noticed how exactly the victim was sitting at the time of the accident. As a matter of fact, he himself had conceded in cross-examination that he did not see how Miss. Chandra was having her head at the time of the impact. R.W. 2 being the conductor of the bus, would have naturally been in the rear part of the bus and there is the possibility of his having noticed how the passengers in the rear portion of the bus were sitting at about the time of the accident. Even so, his evidence that Chandra was leaning on

the window and her head was protruding outside partly and he was dozing, cannot be accepted. In cross-examination, this witness stated that he cannot say how many among the passengers were dozing. He also stated that the window has three cross-bars with an interval of 4" from one another and that the top of the window will be about 12" over the top bar. But the witness pretended that he cannot give the height of the lower edge of the window over the seat level. The lower edge of the window itself should be high enough from the seat level so that the three cross-bars would be a complete protection preventing any head being protruded out in the sitting posture. Perhaps realising this, the witness was not prepared to give the height of the lower edge of the window from the seat level. It appears to have been suggested to this witness that in the sitting posture the head cannot be rested over the top cross-bar and there would be no occasion for the head protruding out. Curiously, the witness has stated that the head can go out in between the bars (though the inter-space between the bars is only 4 inches). The learned Counsel appearing for the contesting respondents wants to construe this answer of R.W. 2 as referring to the interspace betwen the top cross-bar and the top of the window. But we cannot import something which is against the answer of the witness. The witness has categorically stated that a head can go out in between the bars, and not in between the top bar and the top level of the window.

8. It appears to us that even if Miss. Chandra had been dozing while travelling her head should have been resting only against the cross-bar of the window and it could never have been over the top cross-bar protruding out partly. That R.W. 2 and R.W. 1 are highly interested witnesses is evident from their own answers. It is to be noted that the owner of the bus had also been impleaded as a respondent in the claim petitions, and the claimants made no difference between the owner of the bus and the owner of the lorry in respect of their claims. Therefore, R.Ws. 1 and 2, who are the employees of the owner of the bus, are *prima facie* interested witnesses. That apart, both of them have been made to say that the two victims came to be injured entirely due to their negligence. These two witnesses would not even apportion the blame between the injured and the lorry driver. They would throw the entire blame on the injured. This is obviously because of the fear that if they did not say so, the first respondent to the petitions might also be made liable for compensation.

9. It is also significant to note that the theory that Miss. Chandra was having her head over the top cross-bar protruding the head partly outside the window, is an afterthought, for such a case has not even been suggested either to P.W. 1 or to P.W. 3.

10. Admittedly broken glasses were found inside the bus. There is no clear evidence as to how glass pieces were so found. P.W. 6, the Sub-Inspector of Police who investigated the accident and ultimately charged the lorry driver for an offence under section 338, Indian Penal Code, has not thrown any light on this aspect. The Motor Vehicles Inspector who inspected the two vehicles has not been examined before the Claims Tribunal. It is suggested through the evidence of R.Ws. 1 and 2 that the glass pieces found would have been due to the breakage of the glass panes of the bus. But there is no evidence that there were glass panes for the windows of the bus. Under such circumstances, one wonders whether the glass pieces might not be that of the rear-view mirror of the lorry which is likely to have been projecting on its right side. It is quite possible that this rear-view mirror, which is a projection, protruded, into the bus when the two vehicles collided. Even otherwise, it is not impossible that some other protruding object of the lorry hit Chandra on her head. Anyway from the evidence on record it is impossible to hold that Miss. Chandra was having her head partly outside the window. Under such circumstances, the question of contributory negligence does not arise at all in the case of Miss. Chandra. Therefore the question is whether P.W. 1 was guilty of contributory negligence inasmuch as she was holding the cross-bar with the right hand in such a position that her right thumb was gripping the bar on its outer side.

11. The Tribunal below seems to have thought that as passengers are not expec-

ted to put any part of their body outside the window, P.W. 1 was guilty of contributory negligence in having her right thumb outside the window of the bus. But we are of the view that on the proved facts there is no contributory negligence on the part of P.W. 1. It is true that but for P.W. 1 holding the cross-bar in such a position that her right thumb was gripping the bar on its outer side, she might not have been injured. But the question is whether her having the right thumb in that position has been part of the cause of the accident. In this case, there was undoubtedly impact between the two vehicles and such impact would have happened even if P.W. 1 had not been gripping the cross-bar in the way in which she did. Of course, if the thumb was not gripping the bar on its outer side, perhaps it would not have been cut off in the process of the two vehicles colliding with each other. Under such circumstances, we have to see whether the injured can be said to be negligent before ever considering whether she was guilty of contributory negligence, reducing the liability of the wrongdoer. It is true that putting out the hand or any other part of the body outside a fast-moving vehicle would be a negligent act, particularly if the vehicle is moving in a crowded place. In a busy city where there is heavy traffic, it would certainly be highly dangerous to put out the hand or arm or other part of the body so as to be projecting outside the moving vehicle. Even such putting out a part of the body outside the moving vehicle may not be an act which endangers the safety of the person concerned, if the vehicle was not moving in a crowded place but it was moving only in a broad highway, for in such a highway there is no reasonable possibility of any other vehicle coming very close to the vehicle in which the person is travelling. In any event, we are not in a position to hold that mere gripping of the window cross-bar in a position in which the right thumb was gripping the bar on its outer side would be a negligent act on the part of the injured, especially when the vehicle was on a broad highway and not moving in any crowded place. It cannot be said that P.W. 1 the injured, had acted negligently or without due care, merely by gripping the cross-bar of the window when the bus was going in a highroad.

12. The learned Counsel for the respondents referred to some of the decisions of the Courts in England in support of his contention that in this case it must be held that the injured was guilty of contributory negligence. The first case is *Davies* v. *Swan Motor Co. Ltd.*[1] That was a case where an employee of the Swansea Corporation was, contrary to regulations, riding on the steps attached to the offside of a dust lorry belonging to the said Corporation. An omnibus which was overtaking the above dust lorry came into collision with the lorry and then the employee who was standing on the steps of the dust lorry was hit and he received injuries from which he died. It was held that though the driver of the omnibus was guilty of negligence, the deceased man was guilty of contributory negligence resulting in apportionment of liability under the Law Reform (Contributory Negligence) Act of 1945, which is in force in England. The Court of Appeal held that the deceased, by standing where he did on the lorry was in breach of a duty which he owed to the driver of the ominibus not to render more difficult the passing of the lorry by the omnibus, and so increase the risk of collision and therefore there was contributory negligence on the part of the deceased. It was also pointed out in that case that in order to constitute contributory negligence it was sufficient to show that there was a lack of reasonable care by the deceased for his own safety. This decision would not help the respondents in the present case. As we pointed out it is not possible to hold that by merely gripping the window cross-bar of the bus, the injured showed a lack of reasonable care for her own safety. Further the fact that P.W. 1, the injured, was gripping the window cross-bar had nothing to do with the actual collision between the two vehicles and surely it cannot be contended that by so gripping the cross-bar, P.W. 1 had made it more difficult for the lorry driver to pass the bus without the risk of collision with it.

13. *Nance* v. *British Columbia Electric Railway Co.*[2], is a case where the deceased crossed the road which was slippery due to ice and he was run over by a motor

1. (1949) 1 All E.R. 620.
2. (1951) 2 All E.R. 448.

vehicle. The Court of Appeal, British Columbia, took the view that there was contributory negligence, and reduced the quantum of compensation payable by the defendant. On further appeal by the widow of the deceased, the Privy Council restored the finding of the jury in the trial Court holding that there was no contributory negligence. This decision would certainly not help the respondents.

14. *Harris* v. *Toronto Transit Commission*[1], is a decision by the Supreme Court of Canada. That was a case where a boy sitting in a bus projected his arm outside the bus in spite of warning and as the bus went close to a roadside pole, the arm of the boy hit against the pole and it was crushed. That part of the bus where the boy was putting out his arm did not actually come into contact with the pole but only the rear corner of the bus grazed the top of the pole which was set in the sidewalk near the curb. The Supreme Court of Canada held that the driver of the bus was negligent in the driving of the vehicle inasmuch as he drove it too close to the pole, but the boy was guilty of contributory negligence inasmuch as he had put out his arm and only by that act the accident happened. It is significant to note that the area of the window through which the boy had put out his arm did not come into contact at all with the pole. It is only because the boy had put out his arm to a considerable length outside the bus, it hit against the pole and thereby there was injury to the arm. It was under those circumstances it was held that the boy was guilty of contributory negligence. This again would not help the respondents in the present case.

15. *Rajammal* v. *Associated Transport Co.*[2] is a judgment of this Court rendered by Venkataraman, J. There, in a lorry which was loaded with iron rods, the deceased was sitting over the rods. The rods slipped and the deceased also slipped and fell down, ultimately resulting in his death. Undoubtedly, in that case, the deceased had taken a very dangerous position and had acted without reasonable care for his own safety. That cannot be equated with the present case of

1. (1968) A.C.J. 264.
2. (1970) A.C.J. 44.

the injured just gripping the window cross-bars.

16. *Yoginder Paul Chowdhry v. Durga Dass Punj*[1] is a decision of the Delhi High Court where it was held that the pedestrian who crossed the road all of a sudden and was hit by a moving vehicle was guilty of contributory negligence. If a person crosses the road all of a sudden when the vehicle is very close and thereby he is hit by the vehicle, the entire blame cannot be thrown on the driver of the vehicle. In fact, in certain circumstances the entire blame may be on the person who crossed the road all of a sudden and the accident might occur without any rashness or negligence on the part of the driver of the vehicle. Therefore, that case decided by the Delhi High Court is of no help at all to the respondents herein. We hold, therefore, that P.W. 1 is not guilty of contributory negligence.

17. The further question is, what is the amount of compensation payable to the respective injured. The Tribunal below has fixed the compensation payable to P.W. 1 at Rs. 8,000 and that for Miss Chandra at Rs. 25,000 but reduced it to half on the ground of contributory negligence. Even though we hold that there was no contributory negligence on the part of the injured, the respondents are entitled to support the final finding of the Tribunal that P.W. 1 was entitled to only to Rs. 4,000 and Miss Chandra was entitled to only Rs. 12,500 as compensation, on other grounds. On a careful examination of the evidence on record, we are of the view that the assessment by the Tribunal below of the total compensation payable to P.W. 1 at Rs. 8,000 and that to Miss Chandra at Rs. 25,000 is too high and that the same should be reduced to Rs. 5,000 and Rs. 15,000 respectively. It is no doubt true that P.W. 1's right thumb has been completely severed. But the Tribunal itself has found that the injury has not incapacitated P.W. 1 to such an extent that she cannot earn in the future. She was a teacher getting Rs. 125 per month as salary. Apart from that, she had been earning Rs. 30 to Rs. 35 per month by way of private tuition, as per her evidence. It is not a case where due to this injury the

1. (1972) A.C.J. 483.

employer discharged her from service. According to her own evidence, she herself resigned the job of teacher in the Radhakrishna Higher Elementary School, Madras. She has not explained as to why she so resigned. She has admitted that even after the accident she is giving private tuition to students, even though she has not stated how much she is earning by private tuition after the accident. She was aged 54 years on the date of the accident. The Tribunal below has awarded a total sum of Rs. 7,760 (rounded to Rs. 8,000) and considering the above facts, we think the total compensation has to be reduced to Rs. 5,000.

18. Coming to the compensation payable to Miss Chandra, no doubt she had received a serious injury on her head which involved the fracture of the frontal bone. But unfortunately the injury has not caused any permanent disability though it is stated that it has left a permanent scar which disfigures the face of the girl. Dr. Ramamurthy (P.W. 5) of the Government Hospital, Kancheepuram, was the person who examined Miss Chandra in the first instance and he issued the wound certificate Exhibit A-7. He has not spoken to the injury and the nature of the same in his evidence. Only the medical certificate has been marked through his evidence. P.W. 4 the father of the girl, said that Miss Chandra was treated as an in-patient in the Kancheepuram Hospital for 15 days and then she was having treatment as an out-patient for one week at Royapettah Hospital and further one week at Stanley Medical College Hospital. He further stated that even after such treatment Miss. Chandra was complaining of head-ache and also had been fainting often. It is also his evidence that her facial beauty is affected and she has become ugly and that she could not continue her studies. Before us it was stated by the learned Counsel for the appellant that now Miss. Chandra is not having any complaints of head-ache or fainting and she is quite alright. This is all the material that we have. Considering the fact that the injury has fortunately not caused any permanent disability, we think the total compensation fixed at Rs. 25,000 by the Tribunal below is too high and that a sum of Rs. 15,000 would be the proper compensation payable to her.

19. Accordingly, the two Civil Miscellaneous Appeals are partly allowed and there will be an award for a sum of Rupees Fifteen Thousand in M.O.P. No. 53 of 1967 (C.M.A. No. 438 of 1969) and that for a sum of Rupees Five Thousand in M.O.P. No. 54 of 1967 (C.M.A. No. 433 of 1969), which amounts are payable by the insurance company, the 3rd respondent. There will be no order as to costs in either of the appeals.

V.S. *Appeals partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Jayadambal and others .. *Appellants**

v.

The Estates Abolition Tribunal, Thanjavur, now represented by the Additional District Judge, East and West Thanjavur and others .. *Respondents.*

(A) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of* 1948), *section* 13, *Madras Estates Land Act (I of* 1908), *Section* 55—*Land within an Estate taken over —Grant of patta as pannai Land—Earlier procedings for grant of patta under section* 55 *of Act (I of* 1908)—*Determination of character of land—No* res judicata *in proceedings under the Abolition Act.*

(B) *Civil Procedure Code (V of* 1908), *section* 11—Res judicata.

In granting patta under section 13 of the Estates Abolition Act (XXVI of 1948) to the land taken over by Government on the basis that it was pannai land, any decision in earlier proceedings for grant of patta under section 55 of the Madras Estates Land Act (I of 1908) as to the character of the land would not constitute *res judicata.* [*Para.* 3.]

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* W.A. No. 68 of 1966 against W. P. No.133 of 1961. 19*th April,* 1973.

Cases referred to:—

Pollapalli Venkatarama Rao v. *Musunnuru Venkayya*, (1954) 2 M.L.J. 1 (F.B.); *Rajah Satrucharla Sivaskandamraju* v. *Dondasi Venkandhora*, S.A. No. 786 of 1919; *Appa Rao* v. *Gurraju*, (1920) I.L.R. 43 Mad. 869 : 39 M.L.J. 476.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Veeraswami, dated 19th August, 1965 and made in the exercise of the special original jurisdiction of the High Court in Writ Petition No. 133 of 1961 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the Estates Abolition Tribunal, Thanjavur in A.S. No. 142 of 1959 on its file and quash the said order of the Tribunal, dated 30th March, 1960.

R. Gopalaswami Iyengar, for Appellants.

V. Vedantachari, K. Raman and *T. V. B. Karthigeyan*, for Respondents.

The Judgment of the Court was delivered by

N. S. Ramaswami, J.—This writ appeal is against the judgment of Veeraswami, J. (as he then was) dismissing W.P. No. 133 of 1961. The writ was for *certiorari* to quash the order passed under section 13 of Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). The land in dispute is admittedly within an estate which had been taken over by the Government under the Estates Abolition Act. The contesting respondent filed a petition under section 13 of the said Act for a patta for the land on the ground that it was pannai land. Swaminathan Vanniar, whose legal representatives are the appellants before us, contested that petition before the Assistant Settlement Officer, contending that the land was ryoti land, that he was a ryot entitled to a patta in respect of that land and that the petition under section 13 of the said Act for the grant of patta on the ground that it was private land should not be allowed. The Assistant Settlement Officer, after enquiry, came to the conclusion that the land in question was private land and not ryoti land and that the contesting respondents were entitled to patta for the same. Swaminatha Vanniar took the matter in appeal to the Estates Abolition Tribunal, but there also he did not succeed. Thereafter he filed the writ petition, out of which this writ appeal arises, for a writ of *certiorari* to quash the orders of the Tribunal and the Assistant Settlement Officer. Veeraswami, J. (as he then was) held that, on the evidence placed before the Assistant Settlement Officer the only conclusion possible was that the land was private land and that the case of Swaminatha Vanniar that it was ryoti land and that he was entitled to patta could not be countenanced.

2. In this appeal before us, the main contention urged by the appellants is that certain proceedings in a summary suit under section 55 of the Madras Estates Land Act are *res judicata* against the respondents and that they cannot be allowed to contend in the present proceedings that the land is pannai land and not ryoti land. This contention was urged before the learned Judge who heard the writ petition also, but that contention has been rejected.

3. Swaminatha Vanniar was admitted into possession of the land in question in 1948 as a lessee. It was in 1952 that he applied to the Deputy Collector, Thanjavur, under section 55 of the Madras Estates Land Act for a patta. Ultimately patta was granted, and an appeal by the opposite party to the District Court was not successful. The contention on behalf of the appellants before us is that the decision of the Deputy Collector, which had been confirmed by the District Court in the proceedings under section 55 of the Estates Land Act is *res judicata* as against the contesting respondents regarding the question of the character of the land. It is contended that, when the Deputy Collector granted patta to Swaminatha Vanniar, the predecessor-in-title of the appellants before us, it must be deemed that he had decided that Swaminatha Vanniar was a ryot and that the land was ryoti land. It is further contended that the decision of the Deputy Collector, which had been confirmed by the District Court, Thanjavur, has become final and that it is not open to the parties to that dispute to reagitate the question regarding the

character of the land. We are, however, unable to accept this contention of the learned Counsel for the appellants. *Pollapalli Venkatarama Rao* v. *Musunnuru Venkayya*[1] has held that the decision of the Revenue Court as to a claim of occupancy right and the question whether particular lands are situated in an estate or not are not within its exclusive jurisdiction and that therefore it is not *res-judicata* in subsequent civil proceedings. The Full Bench referred with approval to a Bench decision of this Court in *Sri Rajah Satrucharla Sivaskandamraju* v, *Dondasi Venkandhora*[2] and another Bench decision in *Appa Rao* v. *Gurraju*[3] and concluded in the following terms (page 6) :

"We agree with Spencer, J., that the dispute as to occupancy right and the question whether the lands are situated in an estate or not are not matters falling within the exclusive jurisdiction of the Revenue Court, and we differ with respect from Phillips, J."

In the decisions approved by the Full Bench the facts were that there were proceedings in the Revenue Court regarding the grant of patta in which incidentally the character of the lands was also decided by the Court. It was held in those Bench decisions that that question was not within the exclusive jurisdiction of the Revenue Court, that it may incidentally arise in the proceedings before the Revenue Court and that it was open to the civil Court to go into that question afresh. This view has been approved by the Full Bench. In the face of the decision of the Full Bench, we fail to see how the learned Counsel for the appellants can support the contention that the decision rendered by the Revenue Court regarding the character of the land has become final and that it is not open to the parties to that cause to reagitate the question in subsequent proceedings.

4. Further, in the above said revenue proceedings the question regarding the character of the land had been specifically left open. It appears that the respondents before us did not put forward before the Deputy Collector the contention that the land in question was private land. When the matter was before the District Court in appeal, they sought to file an application for amendment of the pleadings and take a fresh plea that the land was a private land and that therefore Swaminatha Vanniar was not entitled to patta. The District Court disallowed the prayer for amendment, leaving open the question regarding the character of the land. That being so, it is not right to contend that the decision of the Revenue Court in the proceedings under section 55 of the Estates Land Act concluded the matter regarding the question of the character of the land.

5. Then, coming to the merits of the case, the learned Judge who dismissed the writ petition has concluded thus :

"With reference to the evidence before it, and having regard to the treatment of the land throughout and the short term leases and the conduct of the defendants and their predecessors-in-title, it considered that the Assistant Settlement Officer had arrived at the correct conclusion that the land was proved to be pannai in character. The jamabandi accounts of certain faslis which were filed before the Assistant Settlement Officer described the land as a private land. This land formed part of a wider extent of land measuring about 5 velis which once belonged to the Junior Prince of Thanjavur. He sold the land in 1932 and eventually it came into the hands of the defendants by the right of purchase. There were, besides, the jamabandi accounts, lease deeds with surrender clauses. One of the witnesses examined in the proceedings under section 13 deposed that the land was noted as Iruvaram in the Record of the Right Register. It is true that this expression Iruvaram may not by itself be conclusive as to the character of the land. But it is one of the factors which may legitimately be taken into account along with other circumstances. It seems to me therefore the Tribunal does not appear to me in error when it agreed with the Assistant Settlement Officer and held that the land was proved to be pannai. It follows that this finding will not only dispose of the

1. (1954) 2 M.L.J. 1 (F.B.).
2. S.A. No. 786 of 1919.
3. (1920) 39 M.L.J. 476 : I.L.R. 43 Mad. 859.

writ petition, but also the second appeal."

6. The second appeal referred to in the above passage arose this way. After the termination of the proceedings under section 55 of the Estates Land Act, Swaminatha Vanniar, who had been dispossessed of the land, filed O.S. No. 275 of 1954 on the file of the Court of the District Munsif of Thanjavur. The suit was for possession on the ground that the land was ryoti land and that he as ryot was entitled to possession of the same. By the time the suit was taken up for trial, the proceedings under section 13 of the Abolition Act (XXVI of 1948) had come to be concluded by the Assistant Settlement Officer and the Estates Abolition Tribunal. As in those proceedings it had been held that the respondents before us, who were defendants in that suit, were entitled to a patta and that Swaminatha Vanniar, the plaintiff in that suit was not entitled to patta, the civil Court dismissed the suit holding that the land was not ryoti land but was only private land. An appeal to the Subordinate Judge by Swaminatha Vanniar was not successful. Then S.A. No. 1314 of 1960 was filed by Swaminatha Vanniar. He died during the pendency of the appeal and his legal representatives were brought on record. This second appeal was also heard by the learned Judge along with W.P. No. 133 of 1961. Along with the writ petition the second appeal was also dismissed.

7. The appellants before us had not really placed any evidence before the Settlement Authority in support of their claim that the land in question was ryoti land. The evidence was practically one way and the Assistant Settlement Officer was right in his conclusion that the land was private land. The learned Counsel for the appellants is not in a position to place his hands on any particular piece of evidence in support of their case that the land was ryoti land. The learned Counsel, however, contends that the land was originally ryoti and that once the land was ryoti it should be presumed to continue to be ryoti land. But there is nothing on record to show that the land was at any time ryoti. In any event, there is no ground at all to hold that the conclusion of the Assistant Settlement Officer confirmed by the Tribunal is vitiated on any ground known to law. The dismissal of the writ petition cannot therefore be seriously questioned.

8. The writ appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and N. S. Ramaswami, JJ.*

The Madras State Wakf Board, represented by its Secretary, having Office at No. 3, Santhome High Road, Madras .. *Appellant**

v.

Khazi Mohideen Sheriff .. *Respondent.*

(A) *Wakf Act (XXIX of 1954), sections 3(1), 5 and 6—Suit against Wakf Board for declaration property is not wakf—Whether dedication by Muslim and property wakf—Burden of proof on Wakf Board—Survey and preparation of list of Wakfs under the Act—No enquiry regarding character of property—Administrative act—No initial presumption in favour of Wakf Board.*

In a suit filed by the plaintiff against the Wakf Board for a declaration of his title to the suit property and for a permanent injunction restraining the Board from taking any action pursuant to a notification under the Wakf Act, it is the defendant Wakf Board which wants to establish that the property is endowed by a Muslim and that it is a Wakf that should shoulder the burden of proof initially. [*Para.* 3.]

The survey and the publication of list of Wakfs made under the Wakf Act by the Commissioner and the Wakf Board is only an administrative act and not a quasi-judicial act. There is no provision under the Act for the Wakf Board to make any enquiry regarding the character of the property. The Commissioner makes only a preliminary survey

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* L.P. A. No. 80 of 1968.

17th July, 1973.

regarding wakfs and a publication of the list of Wakfs is made under section 5. Section 6 which refers to filing of civil suits makes it clear that the decision of the civil Court shall be final. [*Para.* 3.]

(B) *Wakf Act (XXIX of* 1954), *section* 3 (1)—*Wakf—Definition—Main part of section—Dedication by Muslim for religious, pious and charitable purposes—Essential—Inclusive definition in other clauses—Requirements under the main part of definition—To be complied with—Statute—Interpretation.*

The main part of the definition in section 3 (1) of the Act makes it clear that the dedication should be by a Muslim and only then it could be a wakf. The second qualification in order to make a dedication, a wakf, is that it should be for any purpose recognised by the Muslim Law as pious, religious or charitable. The items mentioned in clauses (*i*) to (*iii*) in the latter part of the section which gives the inclusive definition should come within the general clause in the first part of the section, which refers to the purpose of the dedication as one recognised by the Muslim Law as pious, religious and charitable. [*Para.* 4.]

(C) *Wakf Act (XXIX of* 1954), *section* 3 (1), 66-*C—Scope—Grant by a non-muslim for Kazi service in mosque—Not a wakf.*

The very introduction of section 66-C to the Act by the amendment would go to show that unless, a grant made by a non-Muslim comes under any of the clauses mentioned in that section, it would not be wakf. A dedication made by a non-Muslim, even if it is for the purposes contemplated under section 3 (1) of the Central Act, would not be a wakf. Section 66-C says that the Act is being applied to properties given or donated by persons not professing Islam for support of certain wakfs. But for this section, which applies the Act to certain grants made by non-Muslims no dedication made by a non-Muslim would be part of wakf property. [*Para.* 5.]

Under section 66-C the grant should be for the support of a wakf as described in clauses (*a*) to (*c*) in that section. A plain reading of section 66-C indicates that it does not contemplate a non-Muslim creating a wakf himself. He can donate property to an already existing wakf and that too if the wakf is one coming under any of the three clauses mentioned in that section. A grant for Kazi service in a Mosque is not one of the wakfs mentioned in any one of three clauses in section 66-C. [*Para.* 7.]

Cases referred to :—

Mahant Shri Srinivasa Ramanuj Das v. *Surianarayan Das*, (1966) S.C.R. (Supp.) 436 : A.I.R. 1967 S.C. 256 ; *Syed Anwar Batcha Sahib* v. *Jamia Masjid Mosque*, (1966) 1 M.L.J. 379.

Appeal under clause 15 of the Letters Patent from the order of the Honourable Mr. Justice Alagiriswami, dated 20th April, 1967 and made in S.A. No. 788 of 1963 preferred against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 91 of 1962 preferred against the decree of the Court of the District Munsif of Namakkal in O.S. No. 594 of 1959.

M. A. Sathar Sayeed, for Appellant.

Khazi Mohideen Sheriff, for Respondent.

The Judgment of the Court was delivered by

N.S. Ramaswami, J.—This Letters Patent Appeal is against the Judgment of Alagiriswami, J., who allowed the second appeal. The appellant before us is the Madras State Wakf Board, who was the defendant in the suit. The Board published under section 5 of the Wakf Act, Central Act XXIX of 1954, a notification in the Fort St. George Gazette stating that the property in dispute is a wakf. The plaintiff filed the suit out of which this appeal has arisen for a declaration of his title to the suit property and for a permanent injunction restraining the defendant from taking any action in pursuance of the publication of the above said notification. The question was, whether the property was a wakf. According to the plaintiff, the property had been granted by a non-Muslim for the support of Kazi service and his case is that it would not be a wakf as defined in the Wakf Act. On the contrary, the case of the defendant-appellant has been that the property is a wakf. The learned Counsel for the appellant seeks to support such a contention on two grounds, namely, that firstly the grant had been made by a

Muslim and secondly even if it is not a grant made by a Muslim, it came under the definition contained in section 66-C of the Wakf Act. Alagiriswami, J., who heard the second appeal, came to the conclusion that as there had been no evidence as to who made the grant, it was possible that the grant might have been made by a non-Muslim and therefore the property would not come under the definition of the word, "wakf" contained in section 3 (1) of the Act. He further came to the conclusion that the grant was made for Kazi service and that is not one coming under any one of the clauses in section 66-C of the Act. The view of the learned Judge is that for a wakf, as defined in section 3 (1), the grant ought to have been made by a Muslim and if the grant is made by a non-Muslim it would be wakf only if it comes under any one of the clauses of section 66-C of the Act. 'Kazi service' is not one contemplated by section 66-C of the Act. Therefore, the learned Judge held that the property is not wakf and the plaintiff is entitled to a decree as prayed for.

2. There can be no serious dispute that the property had been granted, whether it be by a Muslim or a non-Muslim, only for Kazi service. Extracts from the inam fair register as well as a copy of the inam title deed have been filed. In the extracts from the inam fair register, it is specifically mentioned that the grant was for Kazi service. In the copy of the inam title deed, the genuineness of which is not in dispute, it is specifically mentioned that the grant was for Kazi service. In the very notification made by the Board, the grant is described as one of Kazi service. The notification is as follows :

> "Kazi service Inam Paramathi pious, religious and charitable and mushrut-alkhidmat. For rendering Kazi service in the Mosque 300.00 8.31"

The learned Counsel for the appellant, however, contends that in the extracts of inam fair register, there is some reference that the inam was for Masjid and therefore it must be held that the grant was to the Mosque. No doubt in Exhibit A-2, in one of the columns, namely, column 15, it is stated :

> "In fasli 1230 Mahajid Inam Ji Mohammad Amir".

As Alagiriswami, J., has rightly pointed out, this description in column 15 is rather confusing. The entries in the other columns in the extracts of inam fair register make it quite clear that the grant was for Kazi service. It has been described as Kazi service inam. As stated earlier, even the inam title deed, a copy of which is available, describes the inam as Kazi service inam. It may be that Kazi service is attached to a particular Mosque. But that does not mean that the grant itself is to the Mosque. We have no hesitation in accepting the conclusion of Alagiriswami, J., that the grant was for Kazi service.

3. Another question of fact raised is as to whether the grant has been made by a Muslim or a non-Muslim. Really there is no evidence on record either way. The plaintiff as P.W. 1 stated in the witness box that the grant had been made by a Hindu Ruler. But that statement cannot be accepted as evidence and that is a statement of only his case and nothing more. The plaintiff himself had to concede in cross-examination that he did not know who was the grantor whether the grantor was a Muslim or a non-Muslim. No documentary evidence has been placed either by the plaintiff or by the defendant in order to find out who the grantor was. Due to complete lack of evidence regarding this aspect, the burden of proof becomes important. Alagiriswami, J., has held that the defendant, namely, the Board has to prove that the grant was made by a Muslim, if it wants to support its case that the property is wakf on the ground that it has been granted by a Muslim. The learned Counsel for the defendant contends that the Board having made an enquiry and held that the property is wakf in consequence of which a notification to that effect was published in the Fort St. George Gazette when the plaintiff questioned that notification, the initial burden to prove that the property is not wakf is on him. The contention is that if the plaintiff wants to support his case that the property is not wakf on the ground that the grant had been made by a non-Muslim, the intial burden is on him to prove such a case. In this connection,

the learned Counsel for the defendant invited our attention to *Mahant Shri Srinivasa Ramanuj Das* v. *Surianarayan Das*[1]. That was a case under the Orissa Hindu Religious Endowments Act. Under section 64 of that Act if any dispute arises as to whether an institution is a math or temple or whether a temple is an excepted temple or not, such a dispute has to be decided by the Commissioner under that Act. The said section further provided that any person affected by a decision of the Commissioner may within one year, institute a suit in a civil Court to modify or set aside such decision and subject to the result of such suit, the order of the Commissioner shall be final. The learned Counsel contends that sections 4 and 5 of the Wakf Act are on par with section 64 of the Orissa Hindu Religious Endowments Act and once the Wakf Board causes a notification to be published, it must be held that there has been a quasi-judicial finding regarding the character of the property. The learned Counsel contends that under such circumstances, the initial burden is on the plaintiff, who institutes the suit in a civil Court to show that the property is not wakf. However, we are unable to agree with this contention. The decision contemplated under section 64 of the Orissa Hindu Religious Endowments Act is certainly a quasi-judicial decision. That section contemplates an enquiry to be made by the Commissioner and it further says that subject to the result of a suit which might be instituted in a civil Court, the order of the Commissioner shall be final. But as far as the Wakf Act is concerned, there is no provision for the Wakf Board to make any enquiry regarding the character of the property. The very heading of Chapter II of the Act and the caption to section 4 make it clear that the Commissioner or the Board is not making any enquiry to determine the character of the property. The Commissioner makes only a preliminary survey regarding wakfs and a publication of the list of wakfs is made under section 5. Section 6 which refers to filing of civil suits makes it clear that the decision of the civil Court shall be final. It is nowhere stated that any decision of either the Commissioner or the Wakf Board shall be final subject to the decision by a civil Court for the simple reason that neither the Commissioner nor the Wakf Board makes any decision after an enquiry regarding the character of the property. As already noted, only survey is made and a list of wakfs is published. This is only an administrative act and not a quasi-judicial Act. Therefore, it is the defendant-Board which wants to establish that the property is wakf should shoulder the burden of proof initially. As there is no evidence on either side, the conclusion of the learned Judge that it had not been proved that the grant had been made by a Muslim has to be accepted as correct. Therefore, we have to proceed on the footing that the grant might have been a non-Muslim and it was for Kazi service.

4. Now, we have to examine, on the above finding, whether the property would be wakf. Section 3 (1) of the Wakf Act defines the word, 'wakf' as follows:

> " 'wakf' means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes—
>
> (*i*) a wakf by user;
>
> (*ii*) grants (including mashrut-ul-khidmat) for any purpose recognized by the Muslim law as pious, religious or charitable; and
>
> (*iii*) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable."

The question is, whether a grant made by a non-Muslim, whatever be the purpose for which the grant is made, would come under the above definition. We are quite clear that it would not. The main part of the defining section makes it clear that the dedication should be by a Muslim. Only then it could be wakf. The contention on behalf of the defendant-appellant is that in the latter part of the section which contains the inclusive definition, there is no reference to the grant being made either by a Muslim or by a non-Muslim and therefore the grant made for any of the purposes mentioned in

1. (1966) S.C.R. (Sup.) 436 : A.I.R. 1967 S.C. 256.

clauses (*i*), (*ii*) or (*iii*) in the latter part of the section does not necessarily be one made by a Muslim to make it a wakf. We are unable to agree with this contention. The inclusive definition contained in the latter part of the section cannot go beyond the terms of the first part, which is the main part of the section. In the first part, it is clearly stated that the dedication should be by a person professing Islam. That is one of the qualifications for making a dedication a wakf. The second qualification, in order to make a dedication, a wakf, is that it should be for any purpose recognised by the Muslim law as pious, religious or charitable. This second qualification, is in general terms. Then comes the inclusive definition. It specifies certain items. But there can be no doubt that the items mentioned in clauses (*i*) to (*iii*) in the latter part of the section which gives the inclusive definition should come within the general clause in the first part of the section which, as already stated, refers to the purpose of the dedication as one recognised by the Muslim law as pious, religious or charitable. It is not possible to dissociate the three clauses in the inclusive definition in the latter part of the section from the first part of the section itself.

5. Under the Madras Wakf (Supplementary) Act (XIX of 1961), the term 'wakf' as defined by the Central Act was amended. Section 2 of the Madras Act is as follows:—

> "The term 'wakf' defined in clause (1) of section 3 of the Wakf Act, 1954 (Central Act XXIX of 1954) (hereinafter referred to as the said Act), shall include all property given or endowed by any person professing any religion other than Islam for the support of—
>
> (*i*) mosques, idgahs, imambaras, dargahs, khangahs or maqbaras;
>
> (*ii*) grave yards of persons professing Islam; and
>
> (*iii*) choultries for, or musafarkhanas for, the benefit of persons professing Islam; and the term 'wakf' defined in the clause aforesaid shall include any person aforesaid."

This amendment introduced by the above Madras Act has since been incorporated in the Central Act by the Central Act XXXIV of 1964 by the introduction of section 66-C. The said section 66-C is as follows:—

> "Application of Act to properties given or donated by persons not professing Islam for support of certain wakfs—Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a wakf being—
>
> (*a*) a mosque, idgah, imambara, dargah, khangah or a madhara;
>
> (*b*) a Muslim graveyard;
>
> (*c*) a choultry or a musafarkhana, then such property shall be deemed to be comprised in that wakf and be dealt with in the same manner as the wakf in which it is so comprised."

The very introduction of this section, namely, section 66-C would go to show that unless a grant made by a non-Muslim comes under any one of the clauses mentioned in that section, it would not be wakf. In other words, a dedication made by a non-Muslim, even if it is for the purposes contemplated under section 3 (1) of the Central Act, would not be wakf. As already noted, section 66-C says that the Act is being applied to properties given or donated by persons not professing Islam for support of certain wakfs. But for this section which applies the Act to certain grants made by non-Muslims, no dedication made by a non-Muslim would be part of wakf property.

6. The learned Counsel for the defendant-appellant relies upon *Syed Anwar Batcha Sahib* v. *Jamia Masjid Mosque*[1] which is a decision rendered by one of us. No doubt the observations contained in that judgment support the contention of the learned Counsel for the appellant, that even if the dedication is made by a non-Muslim for Kazi service, it would be wakf. But in that case, the definition of the word, 'wakf' as contained in section 3 (1) of the Act had not been considered along with section 66-C of the Act. That decision has proceeded on the

1. (1966) 1 M.L.J. 379.

footing that the definition of the word, 'wakf' had been amended so as to include all dedications by non-Muslims as well. But, as already stated, the amendment of the definition of the word, 'wakf' was by the Madras Act XIX of 1961 and that has now been incorporated in section 66-C of the Central Act. That means all the dedications by a non-Muslim, even if the purpose of dedication is one contemplated under section 3 (1) of the Act would not be wakf; and a dedication by a non-Muslim can be wakf only if it comes within the four corners of section 66-C. Whether the present dedication comes under section 66-C is another question which we would consider presently. We want to make it clear that in order to treat the property as wakf, as defined in section 3 (1) of the Act, one of the pre-requisites is that the grant ought to have been made by a person professing Islam.

7. Now, the question is, whether the property can be brought under the provisions of section 66-C. As already noticed, under section 66-C, the grant should be for the support of a wakf as described in clauses (*a*) to (*c*) in that section. A plain meaning of section 66-C indicates that it does not contemplate a non-Muslim creating a wakf himself. He can donate property to an already existing wakf and that too if the wakf is one coming under any of the three clauses mentioned in that section. As we have already said, the grant in this case is for Kazi service. Kazi service which would be a mushrut-ul-khidmat is not one of the wakfs mentioned in any one of the three clauses in section 66-C. That is why the learned Counsel for the defendant-appellant had been trying to establish that the grant was to a mosque. If really the grant was to a mosque, there would be no difficulty in holding that the property is wakf, because under section 66-C, a non-Muslim can dedicate property for the support of a mosque and such dedication shall be deemed to be wakf. As we are clear that the dedication in this case is not to a mosque but only to Kazi service to be done in a mosque, we agree with the conclusion of Alagiriswami, J., that this does not come under section 66-C either.

8. The Letters Patent Appeal fails and it is dismissed. As the plaintiff-respondent is not represented, there will be no order as to costs.

V.S. ——— *L.P. Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*M. M. Ismail and Natarajan, JJ.*

Arumugha Kone .. *Appellant**

v.

The Palayamcottai Municipal Council represented by its Commissioner and others .. *Respondents.*

(A) *Tamil Nadu District Municipalities Act (V of* 1920), *sections* 6 (2) *and* 260 (2)—*Public market—Use of—Levy of fee—Fees for sale of goods—Fees for use of shop, stalls in public market—Not a fee being a* quid pro quo *for service rendered—Not a tax—Return or fee to owner for use of property—Easements Act (V of* 1882), *section* 52—*Stall-holder, licensee.*

The petitioner, licensees of the stalls in a Public Market, owned by a Municipality, challenged the levy of enhanced fee proposed by the Municipality for the period commencing after the expiry of the term of the licence by petition filed under Article 226 of the Constitution.

Held: Having regard to the terms and conditions under which the petitioners are allowed to occupy the respective stalls, and the language of section 260 (2) (*a*) and (*b*) of the Tamil Nadu District Municipalities Act, the petitioners are only in the position of licensees as contemplated by the Easements Act. The levy falling under section 260 (2) of the Act is neither a fee in the limited sense of being a *quid pro quo* for the services rendered by the Municipal Council to the stall holder or the market as such, nor a tax, but a return or fee or consideration for the licence, as defined under section 52 of the Easements Act or a permission granted

* W.A. No. 218 of 1972 and W. P. Nos. 1122, 1123 and 1136 to 1142 of 1972.
22nd March, 1973.

by the owner of a property to a stranger to make use of the said property. [*Paras.* 15 *and* 41.]

(B) *Tamil Nadu District Municipalities Act* (*V of* 1920), *section* 260 (2)—*Fees—Used in different meanings in clauses—Section* 260 (2) (b)—*Fees for occupation of a stall in the public market—No question of* quid pro quo *for services rendered to stall holders or to market—Fees includes an element of return to Municipality in its investment—Quantum of return.*

(C) *Statute—Interpretation—"Fees"—Word occurring in statute—Same meaning or different meaning—Context.*

The expression "fees" occurring in a statute should normally have the same meaning throughout the Act. But it cannot be overlooked that the same expression may take a different meaning and colour in the context in which it has been used. Having regard to the context in which the expression "fees" has been used in all the five different clauses section 260 (2) of the Act, it is clear that the said expression does not mean the same thing in all the said five clauses. [*Para.* 12.]

The 'fees' referred to in section 260 (2) (*b*) of the Act means only fees for the occupation of the particular stall situate in the market of which the Municipal Council is the owner and therefore there can be no question of *quid pro quo* in the sense of the said fees being commensurate with the services rendered by the Municipal Council either to the stall-holders or to the markets as a whole. [*Para.* 13.]

It is conceded that the fees contemplated by section 260 (2) (*a*) and (*b*) of the Act can include an element of return to the Municipal Council on the investment, which it has made in acquiring or constructing the market in question. In that event, there is absolutely nothing in the Act to put a limit on the said element of return. What should be the proper rent payable in respect of the lease of the stalls in the market or the fees payable in respect of a licence granted by the Municipal Council for the use of stalls will have necessarily to be variable and flexible depending upon the demand for such place in the particular locality at a particular time and therefore there cannot be any hard and fast rule as to what should be the said return. [*Para.* 14.]

(D) *Tamil Nadu District Municipalities Act* (*V of* 1920), *sections* 6 (2), 260, 261 (2)—*Municipalities—Public market—Shops and stalls—Power to lease—Power to licence—Rights spring from ownership—Power to lease—No express prohibition.*

The employment of the word 'use' in the context in which it occurs in section 260 (2) (*a*) and (*b*) of the Act is more appropriate to a licence than a lease, though there is nothing to prevent the municipality from leasing out the stalls or any place in the market. [*Para.* 16.]

Section 261 (2) of the Act expressly refers to the determination of any lease or tenure. This provision read with section 260 (2) of the Act will clearly indicate that the fess contemplated by section 260 (2) will take in the rent in the case of lease and the fees in the case of the licence. Thus the statute itself contemplates the Municipal Council leasing out or licensing shops or stalls in the public market and realising rents or fees with reference thereto. [*Para.* 19.]

There is absolutely no express prohibition in the statute prohibiting the Municipal Council from recovering rents on the basis of rent or fees on the basis of licence. It may be noticed that section 261 merely enables the Municipal Council to provide places for use as public markets and the statute does not impose an obligation on the Municipal Council to make such provision. [*Para.* 20.]

The capacity of the Municipal Council as a corporate entity to hold property will certainly include its rights to enjoy the property by leasing it out and realising the rents and by granting license in respect thereof and receiving fees therefor. This right springs from the very right of ownership of the property and therefore as long as there is no statutory prohibition for the enjoyment of the property in a particular manner, the Municipal Council can hold the property and enjoy it in the manner most advantageous to it. [*Para.* 23.]

Once it is conceded that the word 'fee' in section 260 (2) can contain an element

of return for the investment, the contention that it must be commensurate with the services rendered by the Municipal Council either to the stall holders or to the market, as a whole, loses all its validity. The right to levy and recover such fees on the basis of *quid pro quo* for the services rendered, is different from the right to realise rents or fees on licence and there being no conflict between the two and there being no statutory provision preventing the Municipal Council from realising rents on license fee by virtue of its ownership of its market, both the rights can be exercised simultaneously and therefore it cannot be contended that the right in this behalf flowing from section 6 (2) of the Act is subject to or controlled by the right to levy fee under section 260 (2) of the Act. [*Para.* 24.]

If the expression 'fees' in section 260 (2) (*a*) and (*b*) means rent or fees for license which the Municipal Council can collect by virtue of its ownership of public market, then it is merely an amplification of the right available to Municipality by implication under section 6 (2) of the Act. [*Para.* 24.]

(E) *Constitution of India* (1950) *Article* 226 *and Tamil Nadu District Municipalities Act* (*V of* 1920), *section* 260 (2)—*Public market —Municipalities—Stall-holders' licencees—Writ—Existence of enforceable right—Essential—Proposed levy of enhanced fee for period subsequent to expiry of licence—No right to challenge.*

The existence of an enforceable right is a *sine qua non* for the exercise of jurisdiction by the High Court under Article 226 of the Constitution. [*Para.* 37.]

The writ petitions are liable to be dismissed on the simple ground that by the enhancement of the fees in question, no right of the petitioners has been affected. [*Para.* 37.]

The period of license in the case of the petitioners who are licensees as defined in section 52 of the Easements Act, ended on 31st March, 1972. Under section 62 (*c*) of the Easements Act, the licence would stand revoked. The proposed new levy commenced from 1st April, 1972. Therefore they had no right to question the enhancement of the levy. No attempt whatever was made by the petitioners to sustain the claim as to its competency to maintain its writ petition as a rate payer. [*Para.* 37.

(F) *Constitution of India* (1950), *Article* 226 *and Tamil Nadu District Municipalities Act* (*V of* 1920), *section* 260 (2)—*Writ of* mandamus—*Existence of right and obligation —Stall-holders licenced year after year—Continuance—If a legal right—Right to question levy fixed for succeeding year.*

The petitioner in order to obtain a writ of *mandamus* must show the existence of a right in him and a corresponding obligation on the other party. [*Para.* 38.]

The fact that a particular stall holder was being continued year after year on his agreeing to pay the fees demanded by the Municipal Council for each year separately, will not confer any legal right on the petitioners to continue to be in occupation of the particular stall permanently and it will not enable him to question the new rate of fees fixed for the succeeding year. [*Para.* 38.]

Cases referred to :—

V. S. T. Thanusthaseem Hammepalli Madarasa, Melapalayam, Tirunelveli District represented by its Huqdar, V. S. T. Syed Thameem v. *Melapalayam Municipality, represented by its Commissioner, Melapalayam, Tirunelveli District,* (1959) 2 M.L.J. 92: I.L.R. (1959) Mad. 906 : A.I.R. 1959 Mad. 506; *Frank Warr & Co. Ltd.* v. *London County Council,* (1904) 1 K.B. 713; *Edwards* v. *Barrington,* 85 L.T. 650; *Attorney-General* v. *Colchester Corporation,* (1952) 2 A.E.R. 297; *R.* v. *Burdett,* 91 E.R. 996; *Attorney-General* v. *Horner,* (1913) 2 *Ch.* 140; *Corporation of Madras* v. *S. A. Khan and others,* (1947) 2 M.L.J. 120: I.L.R. (1948) Mad. 320: A.I.R. 1947 Mad. 447; *M. N. Clubwala and another* v. *Fida Hussain Saheb and others,* (1964) 2 S.C.J. 448 : (1964) 2 M.L.J. (S.C.) 83 : (1964) 2 An.W.R. (S.C.) 83 : (1964) 6 S.C.R. 642 : A.I.R. 1965 S.C. 610 ; *Jothi Timber Mart, etc.* v. *The Corporation of Calicut and another,* (1970) 1 S.C.J. 396: (1970) 1 S.C.R. 629 : A.I.R. 1970 S.C. 264; *Attorney-General* v. *Fulham Corporation,* (1921) 1 Ch.D. 440; *Attorney-General* v. *The Mayor, etc. of the City of Leeds,* (1929) 2 Ch. 291; *M. Pentiah and others* v. *Muddala Veeramallappa and others,*

(1961) 2 S.C.R. 295 : (1963) 1 S.C.J. 768 : A.I.R. 1961 S.C. 1107; *Commissioner, Municipal Council, Guntur* v. *Basu Venkateswara Rao and another*, (1956) An.W.R. 616 : A.I.R. 1957 A.P. 103 ; *Haralal Poddar* v. *The Municipal Board, Dibrugarh and others*, A.I.R. 1958 Assam 156; *V. Parthasarathy* v. *State of Pondicherry*, (1965) M.W.N. 328; *The Maharaja Kishengarh Mills Ltd.* v. *Municipal Board, Kishengarh and another*, A.I.R. 1960 Raj. 135; *H. T. Vasudeva Rao* v. *Vijayawada Municipality represented by Commissioner, Vijayawada Municipality*, (1961) 1 An.W.R. 266: A.I.R. 1961 A.P. 328; *Durga Das Bhattacharya and others* v. *Municipal Board, Banares*, A.I.R. 1962 All. 277; *Corporation of Madras* v. *Spencer & Co. Ltd.*, I.L.R. 52 Mad. 764 : 57 M.L.J. 71; A.I.R. 1930 Mad. 55 ; *Abdul Majeed Qureshi* v. *Corporation of Calcutta and others*, A.I.R. 1967 Cal. 174.

W.A. No. 218 *of* 1972:

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ramaprasad Rao, dated 20th July, 1972 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 777 of 1972 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* forbearing the respondents therein from enforcing or collecting from the petitioner therein the increased fees for the use of the stalls, shops, pans and stands situate in the Mahatma Gandhi Market at Palayamcottai pursuant to the resolution passed by the first respondent No. 1518 (1 to 7) dated 14th February, 1972.

W.P. Nos. 1122, 1123, 1136 *to* 1142 *of* 1972.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the respective affidavits filed in support thereof, the High Court will be pleased to issue writs of *mandamus* directing the respondent-Municipality to forbear from levying and collecting stall fees at the enhanced rates as per the resolution of the Municipal Council No. 1284 dated 28th February, 1972, from the respective petitioners for the permanent stalls in the Nethaji Market, Vellore.

M.K. Nambiar for *K. Chidambaram*, for Appellant in W.A. No. 218 of 1972.

T.R. Mani, for Petitioner in all Petitions.

V.K. Thiruvenkatachari for *Mohan*, for 1st Respondent.

K. Alagiriswamy, for 2nd Respondent.

S. Mohan and *K. Alagiriswamy*, for Respondent in all Petitions.

T.V.B. Karthikeyan, for Government Pleader, for 3rd Respondent in W.A. No. 218 of 1972.

The Judgment of the Court was delivered by

Ismail, J.—Writ Appeal No. 218 of 1972 has been filed against the Judgment of Ramaprasada Rao, J., dated 20th July, 1972 dismissing W.P. No. 777 of 1972, filed by the appellant herein. The Palayamcottai Municipality owns a public market known as the Municipal Mahatma Gandhi Market and the appellant herein happened to be a licensee of stall Nos. 1 and 2 in Block No. 9 of the said market. He filed the writ petition (W.P.No. 777 of 1972) praying for the issue of a writ of *mandamus* or any other appropriate writ, order or direction forbearing the respondents therein from enforcing or collecting the increased fees for the use of the stalls, shops, pans and stands situated in the Mahatma Gandhi Market at Palayamcottai, pursuant to the resolution passed by the first respondent, namely, the Municipal Council, No. 1518 (1 to 7) dated 14th February, 1972. The said market has been established several years ago and is maintained out of the Municipal funds. The market consists of a large number of stalls and one portion of the market is reserved as fresh market. Certain other stalls in another portion are reserved as mutton stalls. In addition to there being a regular market, a weekly shandy or fair is also held every Thursday. On such shandy days, a large number of vendors come to the market to sell their goods. The first respondent-Municipal Council had been farming out the right to collect the fees in the market year after year, as provided for in section 260 (2) of the Tamil Nadu District Municipalities Act, 1920, hereinafter referred to as the Act. The Commissioner of the Palayamcottai Municipality in February, 1972, put up a proposal to the first respondent-

Municipal Council to enhance the fees fixed for the various stalls. At a meeting of the Council held on 14th February, 1972, the first respondent-Municipal Council adopted a resolution No. 1518 by which it raised the fees fixed for the shops situate inside the market by 75 per cent. and for the stalls situate along the perimeter of the market by 100 per cent. Similar enhancements were resolved upon in respect of other fees. The necessary notification was published on 16th February, 1972, in the local dailies, Dhina Thanthi and Dhina Malai. The date of auctioning the right to collect the fees in the market was fixed at 10th March, 1972. The schedule of rates in respect of each stall had been mentioned in the auction notice, which was circulated. The second respondent herein was the highest bidder in the auction held on 10th March, 1972, and his bid amount was Rs. 1,61,600 and the same was accepted by the first respondent-Council by its resolution No. 1590, dated 24th March, 1972. The right that was sold in auction was the right to collect the fees in the market for the financial year commencing from 1st April, 1972 to 31st March, 1973. It is under these circumstances the appellant herein filed the above writ petition for the reliefs referred to above on 5th April, 1972. In the affidavit filed in support of the writ petition, in addition to several other grounds, one of the grounds raised was that no notice or opportunity was given to persons like the appellant to show cause against the enhancement of the licence fees. According to the appellant, subsequent to the resolution of the Municipal Council referred to above, 17 members of the Municipal Council, whose strength has 32, submitted a requisition for a meeting of the Municipal Council to reconsider the Resolution No. 1518 and although the Chairman called for, what was turned out to be an "informal meeting" on 4th March, 1972 and all the 17 members who submitted the requisition were present at the so called "informal meeting", the Chairman and the other members were not present and hence no useful discussion or review of Resolution No. 1518 took palce. On the other hand, the first respondent in its counter-affidavit pointed out that the stall-holders did not submit any petition requesting to withdraw the enhancement as alleged; that an urgent meeting of the Council convened for 9th March, 1972, could not be conducted for want of quorum; that even the members who requisitioned the meeting were not present on that day; and that it was not correct to state that an informal meeting was held on 4th March, 1972.

2. It is against the background of these allegations, the point was raised before Ramaprasada Rao, J., that the appellant herein was not effectively notified about the increase and he and other stall-holders, as aggrieved parties, were not consulted in the matter. The learned Judge, after referring to the facts as emerged from the affidavit and the counter-affidavit, held that in the circumstances and in the facts of the case, he was satisfied that the appellant herein did not raise his little finger against the impost; nor was there any effective opposition made for the prevention of the public auction as proposed in the dailies on 10th March, 1972. In view of this, the learned Judge dismissed the writ petition on 20th July, 1972, as mentioned already.

3. Though the only point that was argued before Ramaprasada Rao, J., was the one relating to the appellant not having had effective opportunity to contest the enhancement of the fees, before us that point was not urged, but the right of the first respondent-Municipal Council to enhance the fees itself was challenged. For the purpose of understanding how the writ appeal happened to be argued before us in this manner, it is necessary to refer to certain other facts.

4 The Tirunelveli Municipality, which is also conducting a public market known as Nethaji Bose Market, enhanced the fee payable by the different stall-holders. Challenging the said enhancement, W.P. Nos. 913, 978 to 988 and 1076 to 1078 of 1970 were filed. The contention raised on behalf of the petitioners in those writ petitions was that under section 260 (2) of the Act, the Municipal Council could collect only fees commensurate to the services it rendered and there being no correlation between the quantum of the fees demanded and the expenses incurred by the Municipal Council in rendering

services to the said public market, the enhancement of the fees was illegal and unauthorised. The said writ petitions were disposed of by Ramaprasada Rao, J., on 25th September, 1970. The learned Judge, after an elaborate consideration of the question held:

> "In conclusion I have to hold that the impost in the instant case is not a tax but certainly it is not a fee which is governed by the doctrine of *quid pro quo* but is a compulsory exaction sanctioned by statute and being annexed with the right of ownership of property, the owner of the public market has the right to vary it by increasing or diminishing it after notice and after such fixation, recover the same from the stall-holder."

Against the judgment of Ramaprasada Rao, J., the petitioner in W.P. No. 981 of 1970 preferred W.A.No. 102 of 1971. The said writ appeal was dismissed *in limine* at the stage of admission itself on 18th March, 1971 by a Bench of this Court. The Judgment in the said writ appeal is a short one and the same is as follows:—

> "On facts, it appears the Municipality has arranged to license each market to the highest bidder. According to the appellant, this is not open to the Municipality. The argument is that the expression 'levy a fee' presupposes that the Municipality itself should fix the fee and that section 260 (2), in so far as it postulates farming out of such fees, does not contemplate that each building could be licensed to the highest bidder at an auction. We do not think it is necessary to decide in this case whether the nature of the levy is a fee or a tax or some kind of statutory collection, as Ramaprasada Rao, J., is inclined to think. What matters is the scope of the power under section 260 (2) of the Madras District Municipalities Act. Looking at the power provided by that provision, we have no doubt that it does include the power to license each building to the highest bidder. It is no doubt true that in constructing and providing markets the Municipality discharges a public duty. Even so, it is entitled to a return for the use of the market, and for such use, it is entitled to levy a fee. There is nothing in section 260 (2) that such a fee it can levy only in respect of a collection of buildings and that too by previous fixation, or farming out the buildings together. Once it has the power to license the markets for fees to be collected in any manner stipulated in the sub-section, it includes also the power, in our view, to license a single market among others to the highest bidder.
>
> On that view, the appeal is dismissed."

It is in view of these earlier proceedings alone, before Ramaprasada Rao, J., the other points dealt with by the learned Judge on the earlier occasion were not argued and the only point with regard to the appellant not having been given an effective opportunity to represent his case against enhancement of the fees was put forward. As a matter of fact, even that case was put forward only because of the reference to a notice occurring in the conclusion of the learned Judge extracted above.

5. Before us, Mr. M. K. Nambiar, learned Counsel for the appellant, contended that since the Bench in W.A. No. 102 of 1971 had stated that it was not necessary to decide whether the nature of the levy was a fee or tax or some kind of statutory collection, as Ramaprasada Rao, J., was inclined to think, the Bench must be deemed to have left that question open, even though it dismissed the writ appeal and consequently the appellant can canvass the correctness of the conclusion of Ramaprasada Rao, J., in the said writ petition before us in this writ appeal. No objection was taken on behalf of the respondents to the course suggested by Mr. Nambiar, and therefore we heard arguments on the validity of the enhancement of the impost resolved upon by the Municipal Council.

6. The writ petitions, namely, W.Ps. Nos. 1122, 1133 and 1136 to 1142 of 1972, have been filed by the stall-holders in the Netaji Market being a public market owned and run by the Vellore Municipal Council. They also contend that the license fee in respect of the stalls has been increased from time to time and by Resolution No. 1284, dated 28th February, 1972, the Municipal Council

resolved to enhance the then existing rate by 10 per cent. with effect from 1st April, 1972, and that such enhancement is illegal and unauthorised, since it bears no correlation whatever to the expenditure incurred by the Municipal Council in the supervision and running of the market. In support of this contention, they have given figures of income and expenditure for various years, as culled out from the Administration Reports of the Municipality. One point of distinction between the cases in these writ petitions and the case in the writ appeal is that in the cases of the writ petitions, the fees in regard to the permanent stalls were being collected by the Municipal Council directly without the same being farmed out, as it has happened in the case covered by the writ appeal. Mr. T.R. Mani, learned Counsel, who appears for the writ petitioners merely adopted the arguments of Mr. M.K. Nambiar, learned Counsel for the appellant in the writ appeal.

7. The contention of Mr. Nambiar, is that a Bench of this Court to which one of us was a party, has in W.A. Nos. 22 to 24 and 190 and 191 of 1968 held that in the Act, fees and tax have been dealt with separately and therefore there is no scope for contending that the word, "fees" occurring in section 260 (2) of the Act means, "tax"; once section 260 (2) of the Act uses the word, "fees", that refers to the levy imposed by the Municipality to recoup the expenses incurred for the services it renders to the market in question and therefore the test of *quid pro quo* must be satisfied by the quantum of levy imposed by the Municipality; that in this case admittedly the Municipality did not seek to defend the levy of the enhanced fees on the basis of the expenditure incurred by it in rendering services to the market having gone up and therefore it did not contend that for the enhanced levy there is *quid pro quo*; that consequently the enhancement of the fees resolved upon by the Municipality is illegal and unauthorised; that the Municipality, being a statutory corporation, can exercise only such powers and functions as have been expressly conferred on it by statute and the only power with reference to the public market that has been conferred on a Municipality being a power to levy fees, it cannot seek to levy anything else; and that the concept of "compulsory exaction sanctioned by a statute" adumbrated by Ramaprasada Rao, J., as distinguished from tax or fees, is something not contemplated by the statute itself and therefore the enhancement of fees in the particular case cannot be supported or sustained on any such ground.

8. As against this, Mr. V.K. Thiruvenkatachari, learned Counsel appearing for the respondents, contended that neither the appellant in the writ appeal nor the petitioners in the writ petitions can seek any remedy under Article 226 of the Constitution of India, since no right of theirs can be said to have been affected by the impugned resolutions of the Municipal Councils, for admittedly they were entitled to use the stalls in the market only upto 31st March, 1972; and not having any right to continue to use the stalls after 31st March, 1972, they cannot complain against the enhancement of the fees for the period from 1st April, 1972 onwards. His second contention is that the fee contemplated by section 260 (2) of the Act is not a fee in the sense of being charges for certain special or specified services rendered by the Municipal Council to the stall-holders, but it is in the nature of a fee for the license granted by the Municipal Council to various stall-holders enabling them to make use of the property of the Municipal Council and therefore the claim for enhanced fees is derivable from the ownership of the market by the Municipality and with reference to such fees, the statute itself does not impose any restriction whatsoever. The payment of fees is not compulsory exaction since a person like the appellant and the petitioners in these cases has always the option to pay the fees demanded by the Municipality and make use of the stall or not to use the stall, if he is not inclined to pay the said fees, whatever the reasons may be; and certainly it is not open to such a person to contend that he will squat on the property, but at the same time will pay what he considers to be a reasonable fee, and not what the owner demands of him. His further contention is that the fees in these cases should not be confused with a license fee, namely, a fee levied for

the grant of a license with the object of regulating and supervising the carrying on of a trade, occupation or activity and the fee in this context is really a fee or consideration for a license in the sense the expression license has been defined in section 52 of the Easements Act, 1882.

9. Before we deal with these contentions, it is necessary to refer to the relevant statutory provisions Section 259 of the Act provides that all markets which are acquired, constructed, repaired or maintained out of the Municipal funds shall be deemed to be public markets; and such markets shall be open to all persons of whatever caste or creed. Sub-section (1) of section 260 states that the Council may provide places for use as public markets. Sub-section (2) of section 260 is as follows:—

> "The Council may in any public market levy any one or more of the following fees at such rates and may place the collection of such fees under the mangement of such persons as may appear to it proper or may farm out such fees for any period not exceeding three years at a time and on such terms and subject to such conditions as it my deem fit:—
>
> (*a*) fees for the use of, or for the right to expose goods for sale in, such markets;
>
> (*b*) fees for the use of shops, stalls, pens or stands in such markets;
>
> (*d*) fees on animals brought for sale into or sold in, such markets; and
>
> (*e*) license fees on brokers, commission agents, weighmen and measurers practising their calling in such markets."

Sub-section (3) enables the Municipal Council, with the sanction of the State Government, to close any public market or part thereof. Section 261 is important and it is as follows:—

> "261. (1) No person shall, without the permission of the executive authority or if the fees have been farmed out, of the farmer, sell or expose for sale any animal or article within any public market.
>
> (2) The executive authority may expel from any public market any person who or whose servant has been convicted of disobeying any by-laws at the time in force in such market and may prevent such person from further carrying on by himself or his servants or agents, any trade or business in such market, or occupying any shop, stall or other place therein and may determine any lease or tenure which such person may possess in any such shop, stall or place."

Section 262, deals with private market and sub-section (1) thereof provides that no person shall open a new private market or continue to keep open a private market unless he obtains from the Council a license to do so. Sub-section (2) deals with the time within which an application for the grant of such license by the owner of the place to be used as a private market should be made. Sub-section (3) is important and the same is as follows:—

> "262. (3) The Council shall, as regards private markets already lawfully established and may, at its discretion as regards new private markets, grant the licence applied for subject to such regulations as to supervision and inspection and to such conditions as to sanitation, drainage, water-supply, width of paths and ways, weights and measures to be used, and rents and fees to be charged in such market as the Council may think proper; or the Council may refuse to grant any such licence for any new private market. The Council may however, at any time, for breach of the conditions thereof, suspend or cancel any license which has been granted under this section. The Council may also modify the conditions of license to take effect from a specified date."

Sub-section (4) deals with the notice to be given of the grant, refusal, suspension, cancellation or modification of the license under that section. Sub-section (5) expressly provides that every license granted under that section shall expire at the end of the year. Section 262-A states that when a license granted under section 262 permits the levy of any fees of the nature specified in sub-section (2) of section 260 a fee not exceeding fifteen per centum of the gross income of the owner from the market in the preceding year shall be charged by the Municipal Council for such license.

10. We would like to point out that the expression, "fees" as used in different clauses of sub-section (2) of section 260, having regard to the context in which it has been used, cannot mean the same thing. Clause (*a*) of sub-section (2) of section 260 refers to the fees for the use of, or for the right to expose goods for sale in, such markets Clause (*b*) uses the expression "fees" for the use of shops, stalls, pens or stands in such markets. It will be seen that the expression, "fees" in these two clauses has been used in the same sense. While clause (*a*) deals with the use of markets as such, clause (*b*) deals with the use of shops, stalls, pens or stands in the markets. With reference to clauses (*a*) and (*b*), the common feature is that the fee is for the use of the place. Under clause (*c*), the fee is levied on vehicles or pack-animals carrying, or on persons bringing, goods for sale in such markets, whether they are sold or not. The fees on vehicles or animals will have necessarily to be paid by the person in charge of the same. Therefore, the expression, "fees" in this clause is not referable to the use of the place as such, as distinct from the fees provided for in clauses (*a*) and (*b*). From this point of view, the fees provided for in clauses (*a*) and (*b*) are analogous to stallage, while the fees provided in clause (*c*) are analogous to toll. Clause (*d*) refers to fees on animals brought for sale into, or sold in, such markets. Here again, what attracts the fees is the bringing of animals for sale into the market or the actual sale of animals in the market, even though the same might not have been brought for sale. From this point of view, the concept of fees in this clause will differ from those in clauses (*a*) and (*b*) on the one hand and clause (*c*) on the other. Clause (*e*) deals with license fees on brokers, commission agents, weighmen and measurers practising their calling in such markets. Only in this case there is the provision for the levy of license fees on the persons concerned in respect of the practice of their callings by the persons concerned, with a view to avoid any malpractice. It is significant to note that except in clause (*e*), even the word, "licence" does not occur in the other clauses.

11. Thus, an analysis of sub-section (2) of section 260 of the Act will clearly indicate that the expression "fees" has not been used in the same sense in all the clauses of the said sub-section.

12. Mr. M.K. Nambiar contended that the expression "fees" occurring in a statute should have the same meaning throughout the Act. Certainly as a general proposition of law, no objection can be taken to the same. But at the same time, it could not be overlooked that the same expression may take different meanings and colour in the context in which it has been used. Having regard to the context in which the expression "fees" has been used in all the five different clauses, of sub-section (2) of section 260 of the Act, it is clear that the said expression does not mean the same thing in all the said five clauses.

13. It is in view of this alone, Ramachandra Iyer, J., as he then was, in *V.S.T. Thanusthaseem Hammepalli Madarasa, Melapalayam, Tirunelveli Distirct, represented by its Huqdar, V.S.T. Syed Thameem* v. *Melapalayam Municipality, represented by its Commissioner, Melapalayam, Tirunelveli District*[1], stated that,

> "the levy of a fee on vehicles which bring the goods for sale in the market and on brokers, commission agents and wieghmen cannot in any sense be said to be a fee in respect of the occupation of the property"

and we are in entire agreement with that statement. Admittedly, the present cases fall under clause (*b*) of sub-section (2) of section 260. From what we have indicated above, it is clear that the fees referred to in the said clause mean only the fees for the occupation of the particular stall situated in the market of which admittedly the Municipal Council is the owner and therefore there can be no question of *quid pro quo* in the sense of the said fees being commensurate with the cost of services rendered by the Municipal Council either to the appellant and the petitioners or to the markets as a whole.

14. Mr. Nambiar, contended that the payment of fees for licence as defined in section 52 of the Easements Act, 1882, is a contractual obligation, while the

1. (1959) 2 M.L.J. 92: I.L.R. (1959) Mad. 906: A.I.R. 1959 Mad. 506.

payment of fees under sub-section (2) of section 260 of the Act is a statutory obligation and once the Municipality has chosen to exercise its rights under section 260 (2) of the Act, it can collect only such fees as would be commensurate with the services rendered by it and it cannot seek to collect either rent on the basis of a lease or fees on the basis of a licence as defined in section 52 of the Easements Act, 1882. Though at one stage, Mr. Nambiar contended that the Municipal Council can collect only fees under section 260 (2) of the Act and it cannot collect any rent for the market of which it is the owner, he, however, conceded before us, as it was conceded before Ramaprasada Rao, J., himself in the batch of writ petitions already referred to that the fees contemplated by clauses (*a*) and (*b*) of sub-section (2) of section 260 of the Act can include an element of return to the Municipal Council on the investment which it has made in acquiring or constructing the market in question. Once this has been conceded, we are clearly of the opinion that there is absolutely nothing in the statute to put limit on the said element of return. What should be the proper rent payable in respect of the lease of the stalls in the market or the fees payable in respect of a licence granted by the Municipal Council for the use of the stalls will have necessarily to be variable and flexible depending upon the demand for such place in the particular locality at a particular time and therefore there cannot be any hard and fast rule as to what should be the said return. As a matter of fact, the counter-affidavit points out that very recently the Palayamcottai Municipality constructed 20 stalls inside the Municipal Mahatma Gandhi Market and auctioned on 24th January, 1972 the right to enjoy the same upto 31st March, 1974. The highest bid ranged from Rs. 5 to Rs. 9 per day, that is, Rs. 150 to Rs. 270 per mensem in repect of stalls whose plinth areas are 10′ × 8′ and 12′ × 4′. It was this which prompted the Municipal Council to enhance the rates for the existing permanent stalls which are much bigger in size than the new stalls, that is, nearly double the size of the new stalls. From the very nature of the case, it should be a subject-matter of bargain between the owner of the property and the person who is permitted to occupy and no person will be willing to occupy a stall unless he thinks that it is worthwhile for him to do so. As a matter of fact, the appellant in the affidavit filed in support of his writ petition has stated that for similar shops situate on the other side of the road opposite to Mahatma Gandhi Market, the rent charged by private owners are roughly equal to or less than the fees fixed by the Municipal Council in the year 1971-1972. That means, the appellant has an opportunity of carrying on his business in a place where he will be liable to pay less than what the Municipality has demanded in the present case. Notwithstanding this, if the appellant chooses to continue his business in the stall in the public market belonging to the Municipality, it cannot be on any other ground except that it is profitable and worthwhile for him to carry on the business in the stall in the public market in question. The position may be different, if there is statutory compulsion that a particular type of business should be carried on only in a public market, in which case the enhancement of the fees or the rents beyond a certain limit may be said to be unreasonable or oppressive. But, here, if the appellant and the petitioners want to carry on their particular business outside the markets in question, there is nothing in law prohibiting them from doing so and if they continue to carry on their businesses in the markets in question, it is solely because they find it profitable to do so and therefore it is not open to them to contend that they will continue to occupy or make use of the Municipal Council's markets on their own terms and not on the terms offered by the owner. So long as there is no statute controlling or regulating the letting of and the rents recoverable from, a property, the owner of the property has the liberty to put his property to the best use possible and obtain the best return. Taking into account that any benefit or advantage the Municipal Council derives in such process ultimately goes to the public; the buildings belonging to such Municipal Councils have been placed out of the operation of the Madras Buildings (Lease and Rent Control) Act.

15. What we have stated above with reference to rents actually applies to fees for licence or permission granted by the Municipality to the various stall-holders. In this case there can be no

dispute that the appellant and the petitioners are only in the position of licensees as contemplated by the Easements Act. The appellant in paragraph 7 of the affidavit filed in support of the writ petition admitted,

> "Each stall-holder enjoys the position of a licensee in respect of his stall. The market shall be kept open between 5 A.M. and 10 P.M. every day. During these hours the licensees are permitted to keep their stalls open and carry on their business".

The petitioners in the writ petitions have also stated in the affidavits:

> "The stall-holders, whether they are considered as lessees or licensees of the Municipality, their relationship is governed by the provisions of the Act, and it is not open to the Municipality in violation of the statute and unilaterally to change the conditions of the lease or license."

Therefore, even they do not claim any status other than that of lessee or licensee. Even apart from such an admission, having regard to the terms and conditions under which the appellant and the petitioners are allowed to occupy the respective stalls, there can be no doubt whatever that they are only in the position of licensees. Bye-law No. 30 relating to the Palayamcottai Municipality requires every person using the market to execute an undertaking in favour of the farmer of the fees, and if the fees had not been farmed out, in favour of the Commissioner of the Municipality to the effect that he would conduct himself in accordance with the bye-laws, regulations and conditions then in force or any other rules, regulations, conditions or bye-laws that may be promulgated from time to time and without executing such a document, he will have no right to use the market. Bye-law 24 (*b*) provided that any person who is in occupation of a stall and who locks it up will have to pay three months' fees therefor in advance to the farmer and enter into an agreement with him and if he fails to do so, the farmer will have a right to evict the said person without any prior notice. We have already referred to the fact that the market can be kept open only between 5 A.M. and 10 P.M. and it is during those hours only the stall-holders can carry on their business. With regard to the Vellore Municipality, involved in the writ petitions, special bye-law (1) provided that the market shall be kept open from 5 A.M to 10 P.M. and during other hours, nobody also will be permitted within the market and the market will be closed and none without the permission of the Commissioner or anybody authorised by him can enter the same. Bye-law 12 (i) states that as the Nethaji Market was to be reconstructed, the stall-holders should vacate their stalls and hand over the same to the Municipal authorities whenever they are required to do so. Bye-law 12 (ii) states that for the purpose of effecting repairs or improvements or if the premises are to be made use of for offices the shall-holders may be required to vacate the stalls at any time and if so required, they are under an obligation to do so on the refund of the proportionate fees. These provisions coupled with the language of section 260 (2) (*a*) and (*b*) of the Act make it indisputably clear that the stall-holders are in the position of only licensees.

16. As a matter of fact, the question whether the stall-holders are tenants or licensees with reference to the provisions of the Act came to be considered by the High Court of Andhra Pradesh in *Veeram Subba Rao* v. *Commissioner, The Eluru Municipal Council*[1], and it held:

> "A person who occupies a site or stall in a public market is liable for the payment of a market toll or fee and is merely a licensee who is allowed to occupy a small portion of the market for the sale of his goods. He has no interest in the land or building he is allowed to occupy and there is no transfer of any such interest by way of lease in his favour. The dues or fees are payable by reason of the provision of space in a public market wherein the occupant is allowed to trade and by reason of sections 259 and 260 of Madras Act V of 1920 which enable such markets to be brought into existence and the Municipal Council to charge fees for the use of the stalls or shops therein. These provisions do not contemplate the transfer of any

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1. (1955) An.W.R. (Sh. Notes) 197.

right to or interest in property in favour of the trader who is allowed to trade in the market on payment of a fee. The payments made by the traders were 'fees' for the use of shops within the meaning of section 260 (2) of Madras Act (V of 1920) and the traders were 'licensees' within the meaning of sections 52 to 54 of the Easements Act. The license is granted for a consideration in the shape of fee payable by the licensee at the rate fixed by the Municipal Council under section 260 (2) (*b*) of Madras Act (V of 1920). The license fee may be increased from time to time if the Municipal Council thinks it reasonable; for section 13 of the Madras General Clauses Act provides, thinks it (presumably a mistake for the words 'that where') an Act confers a power, the power may be exercised from time to time as occasion requires".

In fact, the employment of the word, "use" in the context in which it occurs in clauses (*a*) and (*b*) of section 260 (2) of the Act, is more appropriate to a licence than a lease, though there is nothing to prevent the Municipality from leasing out the stalls or any place in the market. In this context, the discussion of the Court of Appeal in *Frank Warr & Co., Ltd.* v. *London County Council*[1], is instructive. In that case the agreement between persons who were the lessees of the Globe Theatre in the Strand for a term of twenty-one years, described in the agreement as the landlords, and the plaintiffs, therein described as the tenants, contained the following provisions:

"The landlords hereby grant and let, and the tenants hereby take for the term of the landlords' lease commencing the first day of September, 1900 the free and exclusive right to sell refreshments at the Globe Theatre, Newcastle Street, Strand, London, with the necessary use of the refreshment rooms and bars and cloak rooms and wine cellars of the said theatre, together with the free right during the usual hours, of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre, and premises as may be necessary and is usual and proper according to the custom of the theatres, for the pu pose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre wines, spirits, liquors, cigars, cigarattes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses and all other articles, and of providing cloak rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak rooms and on all programmes used and offered for sale at the said theatre".

The agreement called the consideration payable by the plaintiffs to the landlords as 'rental'. The key of the cellars at the theatre had been given by the lessees to the plaintiffs, who had kept the cellars locked, and used them for the purpose of storing the wines and spirits which were to be sold in the theatre. Advertisements had been affixed by nails to the walls in the parts of the theatre in which by the agreement such advertisements might be exhibited. The London County Council, the defendant in the action, having power to purchase the Globe Theatre compulsorily under the London County Council (Improvements) Act, 1899, which incorporated the Lands Clauses Consolidation Acts, gave notice of their intention so to do in February, 1902, whereupon the plaintiffs claimed compensation in respect of their interest under the above agreement. The question for consideration was, whether the plaintiffs who were described as tenants had any interest in the theatre at all so as to be entitled to claim a share in the compensation or whether they were merely licensees. The Court of Appeal agreeing with Wright, J., held that the agreement was only a license and not a lease and therefore the plaintiffs had no interest in the land entitling them to claim a share in the compensation. Collins, M. R., stated:

"Though the word 'let' is used, the subject-matter of the letting is so defined, it seems to me, as most care-

1. (1904) 1 K.B. 713.

fully to exclude the idea that any interest in land is to be given. Instead of letting the refreshment rooms or the cellars, the agreement provides merely for the use of them by the plaintiffs so far as is necessary for its purposes. Even if some of the provisions of the agreement, which have been more particularly relied on by the plaintiffs' counsel such as those which give the right to advertise, and let spaces for advertisements and to use cellars, taken alone, might seem to involve an exclusive use of parts of the premises, and *prima facie* to point to a demise of those parts, they must, I think, be read in connection with the context, and, taking the agreement as a whole, in my opinion the effect of this is merely to provide for the exercise of privileges by the plaintiffs by way of licence, and not to create an interest in land."

Romer, L.J., poited out:

"Reliance was placed by the plaintiffs' Counsel upon the words 'necessary use of the refreshment rooms and bars and cloak rooms and wine cellars'. I do not think that it would really make much difference, even if the words used had been 'exclusive use'; for in *Edwardes* v. *Barrington*[1], the words were 'exclusive right to the use of'. I think 'necessary use' only means use so far as is necessary to enable the plaintiffs to supply refreshments in the theatre, at the proper times when it is being used as a theatre and certainly does not involve an absolute parting with the possession of those parts of the theatre by the lessees to the plaintiffs. Again, the fact that the lessees appear to have entrusted the key of the cellars to the plaintiffs for the purpose of preventing strangers from getting in makes to my mind no difference".

In our opinion, this decision also supports our conclusion that having regard to the language of section 260 (2) of the Act and the bye-laws to which we have drawn attention, the position of the appellant and the petitioners was only that of a licensee and what they were called upon to pay by the Municipal Councils were only fees for such licences.

1. 85 L.T. 650.

17. The position in this behalf was elaborately considered in *Attorney-General* v. *Colchester Corporation*[1]. The Corporation of Colchester owned a market held once a week within the borough and also the soil on which the market was held. The market was of very ancient origin and was re-granted by Royal Charter in 1684. For many years, stallage had been charged by the Corporation, but no charge was provided for in any charter, nor had the amount become fixed by statute, statutory order or custom. In 1939 the Corporation adopted for the first time a method of charging stallage according to the linear foot frontage of the sites, and in 1945 a scale of charges was adopted and published by the Corporation under which persons residing within the borough were charged 1s. 3d. per linear foot, persons residing within ten miles of the borough 2s. per linear foot, and others £1 per linear foot. In 1949 the charge for the last class was reduced to 10s. per linear foot. The plaintiff claimed that the charges were unreasonable and excessive and sought an injunction restraining the Corporation from charging excessively. Danckwerts, J., held that the stall holders were not compelled to take stalls, but did so for their greater convenience and as the result of voluntary agreement between them and the Corporation of whose published charges they were aware, and, in those circumstances, the stallage could not be attacked on the ground that it was excessive. The learned Judge in the course of the judgment pointed out:

"The action, therefore, raises an extremely interesting question on which, there is very little definite authority *viz.*, whether sums required by an owner of a market to be paid for the exclusive occupation of stalls in the market, by virtue of his ownership of the soil on which the market is held, must be limited to reasonable amounts."

The learned Judge futher observed:

"The common law right of the public was to come into the market or fair to buy and sell goods, and the public had no right to erect stalls

1. (1952) 2 All E.R. 297.

or to place their goods on the ground in the market except for a purely temporary purpose. If a seller attempted to appropriate a portion of the ground to his exclusive occupation, he committed a trespass and could be sued by the owner of the soil, unless he obtained the owner's consent and agreed with him on the payment to be made to him for the privilege or convenience of erecting a stall. This payment was called a 'stallage', and, if holes were made in the soil for poles or posts, it was called a 'pickage'. But it was established that, if a trader erected his stall without previous agreement with the owner of the soil, the owner of the soil might waive the tort and sue in assumpsit on an implied contract.

It is settled beyond doubt that the owner of the market or of the soil was under no obligation to provide any stalls or pens or other such conveniences. His duty at common law was limited to providing a space in which buyers and sellers could meet and conduct their trading...... Conversely, the owner of a market owes a duty not to prevent the public exercising their common law rights of resorting freely to the market, and so is liable if he so covers the site of the market with stalls that insufficient room is left for the market to be enjoyed by those who do not wish to take stalls: *R.* v. *Burdett*[1]. In essence, therefore, the right to stallage payments is different from the right to take ordinary tolls from buyers of goods, being not dependent on any royal grant (or prescription amounting to the same) but created *ratione tenurae* or by virtue of ownership of the soil (including the possession or occupation of a lessee)".

Dealing with the contention that the charges were unreasonable and excessive, the learned Judge proceeded to state:

"It is more easily understandable that a condition of reasonableness should be applied to cases where by virtue of the existence of a monopoly the trader has no choice to pay franchise or market tolls, or tolls can be demanded without question by virtue of some custom, where again the trader could not avoid the payment. In such cases it may well have been desirable to provide more effective remedies 'to prevent extortion' (or the extraction of outrageous tolls) by the statute of Westminister the First. *But where the trader is under no obligation to incur the charges except for his greater convenience, as in the case of the voluntary taking of a stall by bargain with the* owner of the soil, the same considerations do not apply." (*Italics are ours*).

The conclusion of the learned Judge was:

"My conclusion, is, therefore, that in cases where an agreement for stallage is reached between the owner of the soil and the stall-holder at rates previously agreed, without unlawful compulsion by the exclusion of any site for common law market activities, it is a voluntary bargain which cannot be attacked by reason of the amount of the stallage. It is plain that in the present case the necessary conditions must be accepted as being operative. The charges payable to the corporation were announced beforehand and were well known to those who elected to occupy stalls, and there is no evidence that sufficient space was not available to any trader who wished to exercise his common law rights for the purpose of selling his goods in the market."

We are clearly of the opinion that the reasoning of the learned Judge in that case clearly applies to the present cases as well. As we have pointed out already, in the writ appeal, the Municipal Council of Palayamcottai published on 16th February, 1972 the enhanced rates which were to come into effect from 1st April, 1972. Similarly, in the writ petitions, enhancement of fees was decided upon by the Market Committee on 21st February, 1972 and the same was approved by the Municipal Council, Vellore, on 28th February, 1972 and the enhanced fees were published. If the appellant and the petitioners were not willing to pay the enhanced fees, certainly they had an option not to continue to occupy the stalls with effect from 1st April, 1972 onwards.

1. 91 E. R. 996.

18. Mr. M.K. Nambiar, contended that the said decision was not based upon any statutory provision and therefore cannot be of any assistance to determine the power of the Municipal Council to enhance the fees leviable under section 260 (2) of the Act. For the reasons we have already indicated as to what the expression, "fees" means in section 260 (2) (*a*) and (*b*), we are unable to accept this argument of the learned Counsel. There is also nothing in the Act to render the principles enunciated by the learned Judge in the above case inapplicable to the cases on hand.

19. With regard to the contention of Mr. Nambiar that the recovery of rent on the basis of a lease is contractual and the recovery of fees under section 260 (2) of the Act is statutory and therefore while purporting to levy a fee under section 260 (2) of the Act, the Municipal Council cannot claim the same as rent, we are of the opinion that the same is misconceived. Though it is unnecessary to consider this question, in the view we have taken that the appellant and the petitioners are in the position of licensees and not lessees, still we shall indicate the reason for our conclusion that the said contention is misconceived. We have already extracted the provisions contained in section 261 (2) of the Act. It expressly refers to the determination of "any lease or tenure". This provision read with section 260 (2) of the Act will clearly indicate that the fees contemplated by section 260 (2) of the Act will take in the rent in the case of a lease and the fees in the case of a license. Thus the statute itself contemplates the Municipal Council leasing out or licensing shops or stalls in the public market and realising rents or fees with reference thereto, and therefore there is no substance in this contention of Mr. Nambiar.

20. We have already extracted the provisions of the Act relating to a private market. The owner of a private market can certainly recover rent as well as fees. The contention that while the owner of a private market can recover rent as well as fees, but the Municipality alone, the owner of the public market, cannot recover any such rent, but recover only fees, has the merit of neither logic nor reasonableness. If the statute itself has expressly provided for such a distinction, certainly the Courts are bound to give effect to the same, unless such distinction itself is established to be illegal or unconstitutional. But in the present cases, there is absolutely no such express provision in the statute prohibiting the Municipal Councils from recovering rent on the basis of lease or fees on the basis of licence and the entire argument is based upon an inference to be drawn from the use of the word, "fees" in section 260 (2) of the Act and on a narrow or limited interpretation sought to be placed on that word. It may be noticed that section 260 (1) merely enables the Municipal Council to provide places for use as public markets and the statute does not impose an obligation on the Municipal Council to make such provision. In view of this, if such a contention, as put forward by the learned Counsel is accepted, a Municipal Council, with a view to augment its revenue, may be tempted not to provide any of its places or structures as public markets but to let them to others for other purposes, and to merely license private markets under section 262 of the Act. It is this possibility alone which prompted Hamilton, L.J., in *Attorney-General* v. *Horner*[1], to state:

> "The justification for the grant of a monopoly of market is that the existence of the market is for the benefit of the public. If the market-keeper is not to get his outlay back and some more, he will give up the market, and where will the public be then?"

21. Mr. V. K. Thiruvenkatachari, in support of his contention relied upon a decision of this Court and a decision of the Supreme Court. The decision of this Court (by a Bench) is the *Corporation of Madras* v. *S. A. Khan and others*[2]. It related to stalls in the Moore Market, Madras, which belonged to the Corporation of Madras. The stall-holders carry on various trades and businesses and sell their wares to members of the public. In their September, 1944, the Corporation served upon the stall holders notices stating that under section 301 (2) of the Madras City Municipal Act, the Standing Committee

1. 1913) 2 ch. 140.
2. (1947) 2 M.L.J. 120: I.L.R. (1948) Mad. 320: A.I.R. 1947 Mad. 447.

(Taxation and Finance) at its meeting held on 30th August, 1944, determined that a specified fee per mensem should be levied for the stalls in their occupation and that with effect from 1st November, 1944, the revised rate per mensem of fee would be levied and they were called upon to pay the fee. On the stall-holders defaulting in payment of the enhanced fee, the Commissioner of the Corporation, purporting to exercise statutory authority, distrained for the recovery of the amount sought to be obtained at the enhanced rate. The stall-holders challenged the validity of the increase and in the suit they claimed a declaration that the demand for enhanced rent and the act of realisation of, and the threat to realise, the enhanced rent by distraint were illegal and *ultra vires* of the statutory powers of the Corporation; and an injunction restraining the Corporation, its servants, agents or representatives from levying any distraint or exercising any of its coercive powers for the realisation of the enhanced fee. The Bench held that whether the agreement between the stall-holders and the Corporation amounted to a lease or tenancy or was for the payment of a fee by the licensee mattered not, and the rights given by the agreement to the stall-holder were to continue until the agreement was determined, and during its subsistence he was under an obligation only to pay the amount which it specified. Therefore, while conceding the right of the Corporation to enhance the levy, whether it was rent or licence fee, since no maximum was prescribed by section 301 (2) of the Madras City Municipal Act, corresponding to section 260 (2) of the Act, the Bench held that the Corporation had no power to enhance the levy during the currency of the agreement or engagement which had already fixed the amount of levy. Mr. V. K. Thiruvenkatachari contends that in the present cases, the enhancement was not effected during the currency of the period of the licence, but it became effective only from the subsequent financial year and therefore, the appellant and the petitioners, if they want to continue to use the respective stalls even after 31st March, 1972, will have to pay the enhanced levy. As we have pointed out already, section 301 (2) of the Madras City Municipal Act corresponds to section 260 (2) of the Act and consequently, having regard to the decision of the Bench referred to above, we hold that this contention is well-founded.

22. The decision of the Supreme Court relied on by V.K. Thiruvenkatachari, is *Mrs. M. N. Clubwala and another* v. *Fida Hussain Saheb and others*[1]. That dealt with the case of a private market known as Jam Bazar Market. The question that had to be considered was the nature of the relationship that existed between the owners of the market and the stall-holders, namely, whether they were in the position of lessors and lessees or licensors and licensees, in the context of the contention of the stall-holders that the rent agreed upon between the parties should not be enhanced by the owners of the market. The Supreme Court, after an elaborate consideration of the agreement that was entered into between the parties and the surrounding circumstances, held that the stall holders were mere licensees of the appellant, that the intention of the parties was to bring into existence merely a licence and not a lease and that the word, "rent" was used loosely for "fee" and in this view, reversing the decision of the High Court, it dismissed the suit instituted by the stall-holders praying for an injunction restraining the owners of the market from:

"(*e*) interfering with the possession and enjoyment of the respective stalls by the appellants-plaintiffs 1 to 4, 6 and 7 so long as they pay the rents fixed for each stall;

(*f*) increasing the rents fixed for the appellants-plaintiffs 1 to 4, 6 and 7 stalls under the written agreements between the said plaintiffs and defendants 4 and 5;

(*g*) evicting of the appellants-plaintiffs 1 to 4, 6 and 7 or disturbing the plaintiffs and their articles in their stalls by defendants 1 to 3".

The contention of Mr. Thiruvenkatachari, is that this decision directly applies to the facts of the present cases, there being no difference between a private market

1. (1964) 2 S.C.J. 448 : (1964) 2 M.L.J. (S.C.) 83 : (1964) 2 An.W.R. (S.C.) 83 : (1964) 6 S.C.R. 642 : A.I.R. 1965 S.C. 610.

and a public market, with reference to the nature of occupation of the stalls by the various stall-holders and the relationship existing between the stall-holders and the owners of the market, and in view of the admission of the stall-holders themselves that they are in the position of licensees and the admitted facts of the present cases. We are of the opinion that this contention is well-founded.

23. Mr. Thiruvenkatachari, alternatively contended that the right to claim a fee from a stall-holder for the permission granted to him by the Municiapl Council to use or occupy a stall, amounting to a licence, as defined in section 52 of the Easements Act, 1882, flows from the very ownership of the market by the Municipal Council and it is not necessary for the Municipal Council to rely upon section 260 (2) of the Act to sustain its claims. Sub-section (2) of section 6 of the Act states:

> "The Municipal Council shall by the name of the Municipality be a body corporate, shall have perpetual succession and a common seal and subject to any restriction or qualification imposed by this or any other enactment shall be vested with the capacity of suing or being sued in its corporate name, of acquiring, holding and transferring property movable or immovable, of entering into contracts and of doing all things necessary for the purpose of its construction".

We are clearly of the opinion that the capacity of the Municipal Council as a corporate entity to hold property will certainly include its right to enjoy the property by leasing it out and realising rents and by granting licence in respect thereof and receiving fees therefor. This right springs from the very right of ownership of the property and therefore so long as there is no statutory prohibition for the enjoyment of the property in a particular manner, the Municipal Council can hold the property and enjoy it in the manner most advantageous to it. Mr. P. Chidambaram, who represented by Mr. Nambiar, at a later stage of the hearing, stated that this right under section 6 (2) of the Act is subject to any restriction or qualification imposed by the Act or any other enactment and sections 259 to 261 of the Act constituting a complete code with respect to public markets and section 260 (2) authorising the Municipal Council only to levy a fee with reference to the doctrine of *quid pro quo*, the Municipal Council cannot claim to recover rent or licence fee, based upon its ownership under section 6 (2) of the Act. For two reasons, we are unable to accept this argument.

24. In the first place, as we have pointed out already, it was conceded before us that the fee contemplated by section 260 (2) of the Act can contain an element of return for the investment, the Municipal Council had made in the acquisition of the market. Once this is conceded, the contention that the expression, "fee" in section 260 (2) must be commensurate with the services rendered by the Municipal Council either to the stall-holders or to the market as a whole loses all its validity. Secondly, if the contention of the appellant is that the expression, "fees" in section 260 (2) (*a*) and (*b*) of the Act means only a *quid pro quo* for the services rendered by the Municipal Council to the market then the right to levy and recover such fees is different from the right to realise rents or fees for licence and there being no conflict between the two and there being no other statutory provision preventing the Municipal Council from realising rents or licence fees by virtue of its ownership of the market, both the rights can be exercised simultaneously and therefore it cannot be contended that the right in this behalf flowing from section 6 (2) of the Act is subject to or controlled by the right to levy fee under section 260 (2) of the Act. On the other hand, if the expression, "fees", in section 260 (2) (*a*) and (*b*) means, rent or fees for licence, as held by us, which the Municipal Council can collect by virtue of its ownership of the public market, then it is merely an amplification of the right available to the Municipality by implication under section 6 (2) of the Act.

25. Mr. M. K. Nambiar, relied on certain decisions in suport of his contention that the Municipal Council being a creature of the statute can exercise only such powers and functions as have been expressly conferred upon it and such

powers and functions are limited by the competency of the Legislature which created the statutory corporation itself. The first decision referred to by him in this behalf is that of the Supreme Court in *Jothi Timber Mart etc.* v. *The Corporation of Calicut and another*[1]. The question for consideration in that case was when item 52 of List II of Schedule VII to the Constitution refers to a tax on entry of goods within the local area for consumption, use or sale therein, whether the State Legislature was competent to enact a provision conferring a power to tax on the timber brought into the city irrespective of the fact whether it was brought for consumption, use or sale therein or it was in the course of transit to another place.' It is in this context that the Supreme Court held that no authority to impose a general levy of tax on entry of goods into a local area is conferred on the State Legislature by Item 52 of List II of Schedule VII of the Constitution and the Municipality derives its powers to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature.

26. The next decision relied on by him is *Attorney-General* v. *Fulham Corporation*[2]. In that case, the statutes conferred power on the Corporation enabling it to provide certain facilities and conveniences for washing and pursuant to that power, the Corporation had established a wash-house, providing certain facilities for customers. In 1920 a new scheme was started by the Corporation on the recommendation of one of its customers which was materially different from the scheme which it was originally carrying on. The question for consideration was, whether the Corporation had the power to do so. It was held that what the Corporation started in 1920 was entirely a new business which it was not authorised to do and the said business cannot be regarded as being ancillary to and consequential upon that which it was entitled to do under the Acts of Parliament.

1. (1970) 1 S.C.J. 396 : (1970) 1 S.C.R. 629 : A.I.R. 1970 S.C. 264.
2. (1921) 1 Ch. D. 440.

27. Mr. Nambiar, then relied on *Attorney-General* v. *The Mayor etc. of the City of Leeds*[1], and in particular on the observation of Luxmoore, J., to the effect:

> "The corporation was incorporated by Royal Charter in the year 1627 in the reign of King Charles I. The fact that it is incorporated by Royal Charter is of importance, because a corporation so constituted, stands on a different footing from a statutory corporation, the difference being that the latter species of corporation can only do such acts as are authorised directly or indirectly by the statute creating it; whereas the former can, speaking generally do anything that an ordinary individual can do."

Mr. Nambiar also relied on a decision of the Supreme Court in *M. Pentiah and others* v. *Muddala Veeramallappa and others*[2] wherein the decision in *Attorney-General* v. *Fullham Corporation*[3], referred to already is referred to.

> "In this context learned Counsel for the appellants invoked the doctrine of law that an action of a statutory corporation may be *ultra vires* its powers without being illegal and also the principle that when a statute confers an express power, a power inconsistent with that expressly given cannot be implied. It is not necessary to consider all the decisions cited, as learned Counsel for the respondents do not canvass the correctness of the said principles."

In our opinion, none of the above decisions has any bearing on the question we have to consider, in view of our construction of section 260 (2) of the Act and the meaning of the expression "fees" occurring in clauses (*a*) and (*b*) of section 260 (2).

28. Mr. Nambiar then referred to certain decisions of the High Courts in India concerning the scope of the power of a Municipal Corporation like the first respondent herein. The decision in

1. (1929) 2 Ch. 291.
2. (1961) 2 S.C.R. 295 : (1963) 1 S.C.J. 768: A.I.R. 1961 S.C. 1107.
3. (1921) 1 Ch. D. 440.

Commissioner of Municipal Council, Guntur v. *Basu Venkateswara Rao and another*[1], was concerned with the resolution of the Municipal Council, Guntur, passed under sections 270 and 312 of the Act imposing a levy on persons selling or displaying for sale any articles or animals on the margins of public roads at particular rates. Though paragraph 2 of the judgment commenced by stating that what the Municipal Council levied was a tax, the judgment considered the same only as a licence fee. As a matter of fact, section 270 does not contemplate a levy of any tax and all that it provides is :

> "270. The executive authority may, with the sanction of the council, prohibit by public notice or licence, or regulate the sale or exposure for sale, of any animals or articles in or on any public street or part thereof."

With reference to this levy of the Municipal Council under section 270 of the Act, the Court observed :

> "In this context when fees are levied presumably under section 270 to enable the Municipality to regulate the sale or exposure for sale of articles in or on any public street the fees levied cannot in any sense of the term be described as a tax. They are levied for the specific purpose of regulating the sale or exposure for sale of the articles in public streets by persons so doing and therefore they must have some relation to the services rendered by the Municipality to regulate the said sales.
>
> They are not in the nature of a tax imposed for general purposes in the interests of general revenue. It is not a tax because the Municipality has no authority to levy such a tax and it has not also followed the procedure prescribed for levying taxes. It is only a fee as the levy is to meet the expenditure that may be incurred by the Municipality for regulating the sales."

Haralal Poddar v. *The Municipal Board, Dibrugarh and others*[2], was concerned with a case where the petitioner therein carried on business of selling fresh vegetables and similar other foodstuffs by keeping a stall in the municipal market of Dibrugarh town, on payment of fees to the lessee of the said municipal market. The petitioner was paying annas four per day since 1945. The Chairman, Municipal Board, Dibrugarh, published a notification showing the enhanced rates of fees for the two zones of the municipal market. It was the said enhancement that was questioned. The contention raised on behalf of the petitioner was that section 140 of the Assam Municipal Act, 1923, only authorised the levy of tolls and fees which necessarily implied an idea of *quid pro quo*. the amount to be fixed as toll and fee should necessarily be correlated to the services rendered and under the garb of tolls and fees, it was not open to the Board to impose a tax. The further argument was that as there was no evidence produced in the case on behalf of the Municipal Board which would go to show that the money collected as fees was set apart for the maintenance of the market and was not credited to the general revenue, it must be presumed that what the Board was levying in the name of toll and fee was really a tax. The Bench of the Assam High Court dismissed that petition holding that no material had been placed before the Court by the petitioner on whom essentially the burden lay to show that the money realised as fees was not utilised for the maintenance of the market. In the course of the judgment, the learned Judges pointed out :

> "Section 140 itself gives power to the Board to charge rents, tolls and fees for the right to expose goods for sale in the shops and stalls standing therein. The Board gave the use of its stalls and shops and further permitted the shop-keepers to exercise rights to expose their goods for sale in the municipal market and as a consideration for the said use, they charged fees which were utilised for the maintenance of the market.
>
> It is not necessary to show that every pie which is realised as a fee is spent for the maintenance of the market. In the report, submitted by the Chairman

1. (1956) An.W.R. 616 : A.I.R. 1957 A.P. 103.
2. A.I.R. 1958 Assam 156.

to the Deputy Commissioner, when he was dealing with the matter, under section 291 of the Municipal Act and which is Annexure 'J' to the petition, it is clearly mentioned that all-round improvements of the market were going on by constructing stalls in the Rice and Pan market and there being a proposal to reconstruct the sheds on the open vegetable market which required a considerable amount for which the enhancement in the rate was necessary.

It was also pointed out in the report that the stall-keepers in and around the pucca vegetable market had been using their respective stalls for residential purpose as well, without paying any fee to the lessee for the night use. All these facts go to show that the rate has been enhanced with a view to develop the market and it cannot be said that there was no correlation between the fee charged and the services rendered. In fact, the petitioner did not object to the levy of any fee; what he is objecting to is the enhancement and no material has been placed before us to show that the enhancement has been arbitrary and the imposition has been capriciously made."

29. *V. Parthasarathy* v. *State of Pondicherry*[1], dealt with a case of enhancement of fees for the halting of buses in Karaikkal bus stand. The learned Judge had to consider whether the power conferred on a Municipality by a decree of the President of France issued in 1880 was a power to levy a fee or a power to levy a tax. The learned Judge held :

"For all these reasons, I hold that the pre-existing law, granting power to the municipalities to impose a levy for granting a licence to use parking places contemplated only the levy of a licence fee commensurate to the services rendered and not the right to levy an arbitrary tax."

30. *The Maharaja Kishangarh Mills Ltd.* v. *Municipal Board, Kishangarh and another*[2], dealt with a levy imposed under section 135 (2) of the Uttar Pradesh Municipalities Act, 1916, on flour mills and other factories, at a certain rate, based on horse power. The High Court held that when any levy is being justified under Item 66 of List II or Item 47 of List III of Schedule VII to the Constitution as a fee, it should be shown that it is for some services rendered by the State or by the Municipality to the particular person concerned and that its incidence is such as to meet the expense of the service rendered, more or less.

31. *H.T. Vasudeva Rao* v. *Vijayawada Municipality represented by Commissioner, Vijayawada Municipality*[1], was concerned with the licence fee levied on hotels. The High Court held that a licence fee cannot be regarded as a form of taxation and should not be resorted to for the purpose of realising revenue, but only to cover reasonable expenses that may be incurred for the issue of licences, the collection of fees and for exercising supervision over the trade and for ensuring that they are being used properly and that the conditions and restrictions imposed under those licences are carried out and the licence fee should not be out of all proportion to the cost of special services to be rendered to the licencees and to the exercise of supervision for purposes mentioned above.

32. The decision of the Allahabad High Court in *Durga Das Bhattacharya and others* v. *Municipal Board, Banaras*[2], was concerned with the levy of a licence fee under section 294 of the Uttar Pradesh Municipalities Act, 1916. In that case, the Municipal Board had framed rickshaw bye-laws in exercise of the powers conferred upon it under sections 298 and 294 and imposed an obligation of taking out licences on the proprietors and drivers of rickshaws and fixed the fees payable for licences. With reference to such fees, the Court pointed out that the scheme of Chapter VIII under which section 294 fell, showed that the provisions contained therein were meant for the purpose of regulation of certain trades, maintenance of public safety and convenience of the inhabitants of the Municipality, that the fees mentioned in sec-

1. (1965) M.W.N. 328.
2. A.I.R. 1960 Raj. 135.

1. (1961) 1 An.W.R. 266 : A.I.R. 1961 A.P. 328.
2. A.I.R. 1962 All. 277.

tion 294, therefore, were to be imposed for the purpose of rendering services, that is, regulation of trades etc., and that the fee contemplated in sections 294 and 298 was a fee simpliciter in which an element of *quid pro quo* was necessarily involved and that it was not a pretence of a fee for a tax ; nor was it a fee for licence as contradistinguished from a fee for services rendered.

33. *Corporation of Madras* v. *Spencer & Co. Ltd.*[1], was concerned with enhancement of licence fee for storing spirit from Rs. 25 to Rs. 200. The levy in that case was purported to be made by the Corporation of Madras under section 365 (2) of the Madras City Municipal Act, corresponding to section 321 (2) of the Act.

34. The last decision relied on is that of the Calcutta High Court in *Abdul Majeed Qureshi* v. *Corporation of Calcutta and others*[2]. In that case the Corporation of Calcutta purported to levy a fee on purchasers of entrails, guts and offals at a slaughter house. The Calcutta High Court, on an examination of the provisions of the Calcutta Municipal Act, 1951, and the bye-laws framed thereunder, came to the conclusion that they made provisions for every person intending to slaughter animals in a slaughter house to make an application for such slaughter to the Superintendent of the slaughter house for a licence and the Corporation issuing a licence in that behalf and recovering a fee therefor and that therefore there was no provision empowering or authorising the Corporation to impose a licence fee on the purchasers of offals, entrails and guts at the slaughter house.

35. In our opinion every one of the above decisions, except that of the Assam High Court, that of this Court in *Parthasarathy's case*[3], and that of the Calcutta High Court, dealt with a case of licence fee in the literal sense, namely, fee for grant of a licence which has been issued for the purpose of regulating or supervising the carrying on of a business, trade or occupation by a citizen. The decision of the Calcutta High Court was not concerned with any general question and it merely held that the actual provisions of the statute as well as the bye-laws did not authorise the imposition of a fee on the purchasers of entrails and offals. This Court in *Parthasarathy's case*[1], was concerned with the construction of a decree of the President of France issued in 1880. It is only the decision of the Assam High Court that dealt with a case, similar to the one which we are considering. Even though that decision has stated that it is not necessary to show that every pie realised as fee is spent for the maintenance of the market, it appears to proceed on the basis that there must be some correlation between the fee charged and the services rendered. If the learned Judges have proceeded to hold that the fee must bear some relation to the services rendered in the form of maintaining the market, running the market, of making an all-round development in the market, with respect to the learned Judges, we are unable to agree with their view. On the other hand, the judgment itself, as we have pointed out already, proceeds on the basis that the Municipal Board gave use of its stalls and further permitted the shop-keepers to exercise rights to expose their goods for sale and as consideration for the said use, they charged fees. If so, whether the fees were actually utilised for the maintenance of the market or not, is totally irrelevant, for the reasons we have already indicated, namely, that the right to recover such fees flows from the very ownership of the market being vested in the Municipal Corporation concerned.

36. With regard to the judgment of the Bench of this Court in W. A. Nos. 22 to 24 and 190 and 191 of 1968, the question that was considered was, whether the expression "fees" occurring in section 321 (2) of the Act was used in the sense of tax or only as "fees" in the sense of *quid pro quo* for the services rendered. After an elaborate consideration of the provisions contained in the Act, the Bench came to the conclusion that the statute has dealt with the power of the Muni-

1. I.L.R. 52 Mad. 764 : 57 M.L.J. 71 : A.I.R. 1930 Mad. 55.
2. A.I.R. 1967 Cal. 174.
3. (1965) M.W.N. 328.

1. (1965) M.W.N. 328.

cipal Council to levy a tax separately and there was no scope for confusion between "fee" and "tax" as they have been used in the statute, and the expression "fee" occurring in section 321 (2) of the Act did not mean "tax" at all. The conclusion arrived at by the Bench, after examination of the provisions of the Act, was recorded as follows :

> "Thus a reference to the provisions of the Act will clearly show that the Act treats taxes and fees separately and it takes care not to confuse one for the other. All the taxes which the Municipal Council is empowered to levy are dealt with under Part III only and no other part of the Act refers to and deals with any tax. Further the Act uses the expression "fees" mainly in three different contexts. One is under section 321 (2) dealing with fee for permissions and licences. The second is fee which the Municipal Council is entitled to collect for certain specific services or amenities it renders to the public in general. For instance under section 254 of the Act the Municipal Council is obliged to provide a sufficient number of places for use as municipal slaughter houses and it enables the Municipal Council to charge rents and fees for their use at such rates as it may think fit. Under section 260, the Municipal Council is empowered to provide places for use as public markets and is authorised to levy one or more of the fees enumerated in sub-section (2) thereof at such rates and on such terms and at such conditions as it may deem fit. Section 270-B, authorises the Municipal Council to construct or provide and maintain public landing places, halting places and cart-stands and levy fees for the use of the same. Section 280 (1) of the Act states that the Council may, and shall if no sufficient provision exists, provide at the cost of the Municipal fund, places to be used as burial or burning grounds or crematoria, either within or without the limits of the Municipality, and may charge rents and fees for the use thereof. The fees referred to in these sections clearly contemplate that they are in the nature of rents or charges collected from the public for the benefit or the amenity that the Municipal Council itself provides at its own cost. The third context in which the expression "fees" has been used is Schedule IV of the Act. Rule 33 of the Schedule IV refers to distraint fees and provides that the same shall be payable at such rates not exceeding those mentioned in Appendix C to the rules as may be, from time to time, determined by the Council. Similarly, rule 36 refers to what is called warrant fees. These clearly indicate that the word "fee" has been used in the sense of the expenses incurred by the Municipal Council which it can recover from the person concerned. Thus the expression "fee" and "tax" has not been indiscriminately used in the Act as has been done in the Calcutta Municipal Act to which we shall refer presently."

Thus, it will be seen that the above decision, far from supporting the contention of Mr. Nambiar, really supports the conclusion we have come to, since the Bench in that case recognised that the expression "fees" in the Act has been used to denote also payments in the nature of rents or charges collected from citizens for the benefit or the amenity that the Municipal Council itself provides at its own cost.

37. We are also of the view that the writ petitions are liable to be dismissed on the simple ground that by the enhancement of the fees in question, no right of the petitioners has been affected. We have already held that the position of the petitioners was that of a licensee and that the period of licence ended on 31st March, 1972. As we have pointed out already, this position has been admitted by the petitioners themselves. Even though the petitioners in the affidavits filed in support of W.P. No. 1122 of 1972 contended that the stall-holders have rights of a fairly permanent character and that they are entitled to the renewal of the term year after year, Mr. T. R. Mani, was not able to bring to our notice any fact which would support or substantiate this claim. Therefore, we proceed on the basis that the petitioners and the appellant were in occupation of the respective stalls as licensees as defined in section 52, Ease-

ments Act, 1882, for the year ending with 31st March, 1972. Section 62 (*c*) of the Easements Act, itself provides that a license is deemed to be revoked where it has been granted for a limited period and the period expires. Therefore, the licences stood revoked as on 1st April, 1972 and if the petitioners and the appellant wanted to continue to use the stalls thereafter, they could do so only on the basis of fresh licences and for such fresh licences the petitioners and the appellant would have to pay the fee demanded by the Municipal Councils and they had no right to question the enhancement thereof, with reference to the fee prevailing for the year 1971-72. As we have pointed out already, the Municipal Councils did not compel the petitioners and the appellant to occupy the stalls and pay the enhanced fees and the latter should pay the licence fee fixed for the year 1972-73 only if they wanted to continue the use or occupation of the stalls. In this view, the petitioners and the appellant have no right to question the enhancement of the fees, since the said enhancement cannot be said to have affected any of their existing rights. It has been repeatedly held that the existence of an enforceable right is a *sine qua non* for the exercise of jurisdiction by the High Court under Article 226 of the Constitution of India and there being no such enforceable right in the petitioners, they are not entitled to the issue of any writs by this Court.

38. However, Mr. P. Chidambaram, learned Counsel, contended that the appellant can still obtain relief under Article 226 of the Constitution, because the appellant is a rate-payer and as a rate-payer he can question the action of the Municipal Council and secondly the practice had been to continue the same stall-holder year after year. We are unable to accept either of the above contentions. There is absolutely no case put forward by the appellant and no factual materials have been placed before this Court to sustain his claim that as a rate-payer the appellant can challenge the action of the Municipal Council. As a matter of fact, a specific plea has been taken by the first respondent in paragraph 6 of its counter-affidavit and notwithstanding this, no attempt whatever was made by the appellant to sustain any such claim as to his competency to maintain the writ petition as a rate-payer. There is therefore no substance in the first of the grounds mentioned by the learned Counsel.

39. Equally without substance is the second ground. What the appellant has prayed for is the issue of a writ of *mandamus* and in order to obtain such a writ, he must show the existence of a right in him and a corresponding obligation placed upon the first respondent towards the petitioner. The fact that a particular stall-holder was being continued year after year on his agreeing to pay the fees demanded by the Municipal Council for each year separately will not confer any legal right on the appellant to continue to be in occupation of the particular stall permanently and it will not enable him to question the new rate of fees fixed for the succeeding year.

40. Having regard to the above conclusion of ours, it follows that the use of the expression, "compulsory exaction sanctioned by statute" by Ramaprasada Rao, J., in his judgment, dated 5th September, 1970 in the batch of writ petitions referred to already, is not appropriate, though what is meant by that expression is made clear by the learned Judge himself by stating that the same was "annexed with the rights of ownership of the property". All that the learned Judge intended to state was that it was a demand made by the Municipal Council in the exercise of its right as the owner of the public market, as consideration for its allowing the stall-holders the use of the stalls. If a stall-holder does not want to continue to occupy the stall, there is no question of the Municipal Council compelling him to remain in occupatior and pay the fees which demands.

41. Except for this clarification, we are in entire agreement with the reasoning of the learned Judge that the levy falling under section 260 (2) of the Act is neither a fee in the limited sense of being a *quid pro quo* for the services rendered by the Municipal Council to the stall-holder or the market as such, nor a tax, but a return or fee or consideration for the licence, as defined in section 52 of the Easements Act or a permission, granted by the owner of a

property to a stranger to make use of the said property.

42. No other point was urged in the writ appeal.

43. Mr. T.R. Mani, learned Counsel for the petitioners in the writ petitions, raised two other points. In the counter-affidavit filed on behalf of the Vellore Municipal Council, it was contended that the site on which each one of the stalls in the occupation of the petitioners is situate would be of the value of Rs. 16,400 and 9 per cent. of the cost would be Rs. 125 per mensem; and that the petitioners were called upon to pay only Rs. 40-50, the same being one third of the fair rent that could be fixed for the stall. In the reply affidavit, the petitioners contended that a stall comprises of a room measuring 9'×7 1/2' and an open verandah measuring 7 1/2×'/7', and covering a total area of just 120 sq. ft.; that the value of such a space of 120 sq. ft., could not be calculated at Rs. 16,400 which worked out at a staggering figure of over Rs. 130 per sq. ft. or at Rs. 32,500 per ground ; and that the maximum price of land in the business locality in Vellore Town at the junction of Mandi Street; Long Bazaar and Main Bazaar had been fixed at Rs. 4-50 per sq. ft. by the State Government. We are of the opinion that this controversy is wholly irrelevant. Simply because a particular piece of land was valued by the Government for purposes of Stamp Act or for purposes of registration at Rs. 4-50 per sq. ft., it cannot be taken to be a measure for finding out what should be the reasonable return to the Municipality, with reference to the stalls situate in its public market. As we have pointed out already, that will vary from place to place and from time to time depending upon the demand for a stall at a particular place and at a particular time. Even assuming that the facts stated by the petitioners in the reply affidavit are correct, in our opinion, that does not affect in any way the enhancement of the fee made by the Municipal Council.

44. The next point urged by Mr. T. R. Mani, is that the Municipal Council by its resolution, dated 28th February, 1972, resolved to enhance the fee by 10 per cent. only, but because of the Commissioner's rounding off to the nearest five paise, in particular cases the enhancement has amounted to 12 1/2 per cent. In the counter-affidavit filed on behalf of the Municipal Council, it is contended that while fixing the licence fee in respect of the stalls the fee was rounded off to the next five paise with the result there was a slight increase in the fees levied and collected, and that the procedure followed is in accordance with the rules and the administrative instructions issued by the Government from time to time. Before us, it is contended on behalf of the Municipal Council that this procedure is being followed by all the Municipalities in the State, pursuant to a circular issued by the Government. It is not necessary for us to decide in these writ petitions this question, namely, whether the said rounding off should be done only by the Municipal Council or can be done by the executive authority, pursuant to any circular or administrative instruction issued by the Government, since the petitioners herein have simply prayed for a writ of *mandamus* to forbear the Municipal Council from levying and collecting stall fees at the enhanced rate as per Resolution No. 1284, dated 28th February, 1972 and have not prayed for any relief in their petitions with reference to the said rounding off, stated to have been effected by the Commissioner of the Municipality.

45. Under these circumstances, the writ appeal as well as the writ petitions fail and they are dismissed. However we do not make any order as to costs.

V.S. *Writ appeals and writ petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT.—*G. Ramanujam and V. Ramaswami, JJ.*

Swadeshi Cotton Mills Company Ltd., Pondicherry, Mudaliarpet Commune, Pondicherry, represented by the Secretary .. *Applicant**

v.

Commune of Pondicherry represented by Mayor of Pondicherry Commune, Pondicherry and others .. *Respondents.*

(A) *Pondicherry Municipal Law* (1880), *Articles* 52 (6) *and* 46—*Resolution of Pondicherry commune dated* 12*th May*, 1961—*Impost levied under on cotton yarn or cloth brought into Pondicherry commune—If tax or fee—Distinction between tax and fee if may be imported into French law—Validity of levy.*

(B) *Interpretation of Statutes—Contemporaneous construction.*

The municipal tax levied under the Municipal law (1880) by the Pondicherry Commune, *viz.*, '*droit de surveillance des merchandies en circulation*' (supervision fee on merchandise in circulation), on articles brought into the Commune is in the nature of a tax and not a fee.

[*Para.* 10.]

There is no authority or material to show that the French law in fact recognises the distinction between a tax and a fee. Even if the distinction between a tax and a fee is imported into the taxing system under the French law which treats both of them as direct taxes and the validity of the taxing provisions under the French law is to be tested with reference to the said concept which arose as a result of the peculiar characteristics of the Indian Constitution the various resolutions passed by the Pondicherry Commune before or subsequent to 1921 show that the tax element is predominant and that there need not be any *quid pro quo* for imposing the levy. Hence it cannot be contended that the supervision charges levied by the Pondicherry Commune under the resolution dated 12th May, 1961 on cotton yarn or cloth brought into the Pondicherry Commune are bad for the reason that no services are rendered by the Pondicherry Commune. [*Para.* 12.]

The impugned tax is being levied by the Pondicherry municipality under the municipal resolution dated 12th May, 1961 lawfully passed in exercise of the taxing powers vested in the Municipal Council under Article 52 (6) read with Article 46 (2) of the Municipal Decree dated 12th March, 1880 and is valid. The argument that Articles 52 and 46 only provide the procedure for levy of tax and they do not themselves authorise the levy is untenable. [*Para.* 15.]

Further, right from the year 1880 when the Decree was passed by the President of the French Republic, Article 52 (6) has been construed as dealing with the various heads of taxation which the Municipality is entitled to impose and the tax in question not having been challenged on the ground that the taxing power has not been traced from that item, Article 52 (6) should be so construed as would accord with the long usage and the belief which the persons concerned entertained. For, it is well established that where the meaning of a statute is in doubt the Court may resort to contemporaneous construction, that is, the construction placed upon the statutes by its contemporaries at the time of its enactment and soon thereafter.

[*Paras.* 17 *and* 21.]

It must therefore be held that the impugned levy had been duly authorised and that it is validly continued under section 7 of the Pondicherry (Administration) Act (XLIX of 1962). [*Para.* 21.]

Cases referred to :—

Commissioner, H. R. E. v. *L. T. Swamiar*, 1954 S.C.J. 335 : 1954 S.C.R. 1005: (1954) 1 M.L.J. 596 : A.I.R. 1954 S.C. 282; *Parthasarathy* v. *State of Pondicherry*, 1965 M.W.N. 328 ; *Asheton Smith* v. *Owen*, (1906) 1 Ch. 179; *Clyde Navigation Trustees* v. *Laird*, (1883) 8 A.C. 658; *Migneault* v. *Malo*, (1871) 4 L.R. (P.C.) 123.

* W.A. No. 603 of 1971 (P) and W. P. No. 1712 of 1973 (P). *19th June*, 1973.

W. A. No. 603 *of* 1971:—

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramaprasada Rao, dated 7th July, 1971 and made in the exercise of the Special Original Jurisdiction of the High Court in (Writ Petition No. 1574 of 1970) (P) presented under Article 226 of the Constitution of India to issue a writ of Declaration declaring that the Resolution of the Pondicherry Commune, dated 12th May, 1961 levying octroi duty is illegal and void and direct the refund to the Petitioners Company of the octroi duty collected from the Petitioner Company for the period 12th May, 1961 onwards.

W.P. No. 1712 *of* 1973 (P)

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue writ of declaration declaring the Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees) Ordinance, 1973, promulgated by the Administrator of Pondicherry, on 18th January, 1973 and published in the Gazette Extraordinary No. 2, dated 18th January, 1973 as unconstitutional and illegal in so far as it affects the petitioner.

K. K. Venugopal, for Appellant in Writ Appeal and *V. Manivannan* for Petitioner in Writ Petition and of *F. S. Nariman*, Additional-Solicitor-General assisted by *V. S. Radhakrishnan*, Government Pleader for Pondicherry at Madras on behalf of the Respondents in the Writ Appeal and in the Writ Petition.

The Judgment of the Court was delivered by

Ramanujam, J.—The Writ Appeal is directed against the judgment of Ramaprasada Rao, J., in W.P. No. 1574 of 1970 (P). The appellant is Swadeshi Cotton Mills Co.,Ltd.,Mudaliarpet, Commune, Pondicherry, hereinafter called the Mills. It is a public limited company which took over the quondam Savana Mills in the year 1956. For the purpose of its business the Mills obtains most of its raw materials and other stores from outside the Pondicherry State. It purchases cotton from various States in the country and also imports the same from abroad. In addition it also purchases various materials like colour chemicals, sizing and packing materials, kerosene oil lubricants, spare parts, stationery, building materials and fuel etc. from places outside the Pondicherry State. Mudaliarpet Commune, in which the Mills are situate is not served by Railway and even the road transport could only be through the town of Pondicharry. The goods purchased by the Mills from outside Pondicherry State have, therefore, to be brought into Pondicherry Commune by rail or by lorries. If the goods are sent by rail they are cleared at the Pondicherry railway station on payment of what the petitioner initially called "octori duty" but which later transpired to be a Municipal tax or fee levied by the Pondicherry Commune in exercise of its powers under the Municipal Law of 1880. After such clearance of the goods from the railway station, when they are brought to Mudaliarpet Commune, through the roads, they are checked at the Commune boundary and a similar tax or fee is again levied. When, after the manufacture the Mills despatches the yarn, cloth etc. to various places outside the Pondicherry State they pass through Pondicherry Commune again, a similar tax or fee is levied on the goods despatched.

2. The Pondicherry Commune, by the resolutions, dated 5th May, 1961 and 12th May, 1961 enhanced that duty on several articles brought into Pondicherry Commune by rail or road. The appellant challenged the power of the Pondicherry Commune to impose such a charge on the goods which merely pass through that Commune on the ground that the nature of the duty being an "octroi" the Pondicherry Commune cannot levy any duty on goods which are not intended to be consumed therein and that the said levy is unauthorised and illegal. The appellant's further case is that, even if the levy is not in the nature of "octroi", it would still be unauthorised, illegal and beyond the competence of the Pondicherry Commune, and that even if the provisions of the Municipal Act of 1880 are construed to authorise the levy under the caption "weighing, measuring and gauging charges", the

levy in question which does not contemplate any *quid pro quo* cannot be justified.

3. The respondents, the Pondicherry Commune and the Union Territory of Pondicherry contended that the levy made by the Pondicherry Commune is legal and duly authorised, that the impost is only a tax and not a fee, that such taxes have been levied and collected practically from the year 1880 without any challenge from any quarter and that, in any event, the validity of the impost could not be attacked in view of section 7 of Central Act XLIX of 1962.

4. The question whether the impost impugned by the appellant is in the nature of "octroi" though urged in the writ petition was given up before us, and the learned Counsel for the appellant confined his challenge only in relation to three matters: (1) that the impost in this case cannot be justified as a fee; (2) that there being no authority to levy a tax, the levy in this case is illegal; and (3) that section 7 of Central Act XLIX of 1962 could validate only taxes lawfully levied earlier and that the same cannot be invoked to validate unlawful or unauthorised levies. We, therefore, proceed to consider only the said objections.

5. Originally Pondicherry was a French Settlement administered by two sets of laws: (1) the Metropolitan Law, *i. e.*, laws made by the French Parliament; and (2) the laws made by the State Legislature of Pondicherry. For the first time on 12 March, 1880 by a Decree passed by the President of the French Republic, Pondicherry State was divided into 17 Communes. The Commune was a basic administrative cell and it enjoyed a large measure of decentralisation. It was administered by two bodies, the Municipal Council which had deliberative powers and the Mayor, whose powers were executive. On 26th December, 1910 the Pondicherry Commune, for the first time levied a measurement and weighment fee in order to secure additional fund required for the maintenance of the roads of the town in good condition, on ground-nuts brought into the Commune whether these ground-nuts are intended to be exported or not. Later, by a further resolution, dated 28th October, 1917 it fixed rates of levy for a large number of other articles. By resolution dated 13th August, 1921 it, however, resolved to redesignate the above impost as "supervision fee on merchandise in circulation". By a later resolution, dated 16th August, 1935 the above supervision fee was levied in respect of various other commodities including cotton. On 6th September, 1946 there was a further resolution raising the fee for supervision on merchandise in circulation in relation to cotton from fifty paise to one rupee per unit, whatever be the weight and size of the bales of cotton or cloth. On 5th May, 1961 the Commune resolved to fix the rates of levy for cotton waste. By a resolution dated 12th May, 1961 the above supervision charges were raised from one rupee to two rupees per bale in respect of every bale of cotton yarn or cloth. It is this resolution imposing a higher rate of charge on cotton, cotton yarn and cloth etc., which appears to have provoked the appellant to file the writ petitions challenging the validity of the levy.

6. As a result of the *de facto* transfer of French Settlements in India to the Indian Union following a treaty of cession in 1954, the administration of these Settlements was carried on by the Government of India by applying the provisions of the Foreign Jurisdiction Act and by orders of the President issued from time to time till the *de jure* merger which took place on 16th August, 1962. By the 14th amendment to the Constitution, Pondicherry Territory has been treated from 16th August, 1962 as a Union Territory and Article 239-A was introduced enabling the creation by Parliament of local Legislatures or Council of Ministers or both for certain Union Territories including Pondicherry. Later Parliament has enacted the Pondicherry (Administration) Act, 1962 (Central Act XLIX of 1962) providing for the administration of Pondicherry. By section 4 of that Act, all laws in force immediately before the appointed day that is, 16th August, 1962 in the former French Establishments when the Treaty of cession came into force, were continued in Pondicherry until amended or repealed by a competent

Legislature or other competent authority. Section 7 of that Act is as follows:—

> "*Continuance of existing taxes*: All taxes, duties, cesses, and fees which, immediately before the appointed day, were being lawfully levied in the former French Establishment or any part thereof shall continue to be levied n Pondicherry and to be applied to the same purpose, until other provision is made by a competent Legislature or other competent authority."

In exercise of the power contained in Article 239-A Parliament had enacted Central Act XX of 1963 providing for the Constitution of Legislative Assemblies and Council of Ministers. On 1st July, 1963 the Pondicherry Legislature started functioning. The levy referred to above and complained of by the appellant continued to be made on the basis of section 7 of Central Act XLIX of 1962.

7. The appellant for the first time on 4th November, 1969 complained to the Mayor of Pondicherry Commune against the said levy treating it as an "octroi" duty. On 21st April, 1970, the appellant issued a notice to the Mayor of Pondicherry Commune to refund a sum of Rs. 3,62,839. 94, the amounts said to have been collected by the Commune from 12th May, 1961 upto that date. On 3rd May, 1970 the appellant filed the Writ Petitions Nos. 1574 and 1575 of 1970, contending that the impugned levy cannot legally be made by the Pondicherry Commune where the goods are neither produced nor consumed and claiming refund of the tax so far levied. The said petitions came to be dismissed by Ramaprasada Rao., J, holding that the levy is not in the nature of "octroi", that the levy was legally imposed and that the same was rightly continued under section 7 of Central Act XLIX of 1962. The appellant thereafter has filed this appeal challenging the decision in the said writ petitions.

8. After the filing of the Writ Appeal the Pondicherry Legislature had promulgated an Ordinance called The Pondicherry Municipal Decree (Levy and Validation of Taxes, Duties, Cesses and Fees); Ordinance, 1973, conferring on the Municipalities the power to levy all taxes which were being levied by the Pondicherry State before. The appellant has, therefore, filed W. P. No. 1712 of 1973, questioning the validity of the said Ordinance, presumably apprehending that the said Ordinance would be relied on by the Pondicherry State to sustain the levy which is impugned in the Writ Appeal. But at the time of the hearing, the learned Additional Solicitor-General appearing for the Pondicherry State stated that he does not propose to sustain the levy impugned in the Writ Appeal by invoking the provisions of the Ordinance. In view of this statement, Mr. Venugopal, learned Counsel for the appellant did not press the Writ Petition. It is, therefore, unnecessary for us to consider the Writ Petition on merits. The Writ Petition is, therefore dismissed. No costs.

9. The appellant's first submission is that the duty in question though levied as supervision duty was at its origin a measurement and weighment fee for services rendered and that, therefore, the levy in this case having been made without reference to any service whatever rendered by the Municipality either to the appellant or to the goods in question, is invalid. Our attention had been drawn to the resolution, dated 26th December, 1910 of the Pondicherry Commune which for the first time introduced a duty called "*droit de measurage et de pesage*", a duty for measurement and weighment, which according to the learned Counsel clearly connotes that the levy is only a fee for services rendered and not a tax as such. According to the learned Counsel the resolution dated 13th August, 1921 redesignating the duty for measurement and weighment as a supervision duty on merchandise in circulation will not change the character of the levy and that it has to be taken as a fee and not a tax. The learned Counsel also points out that there is a clear-cut distinction between fee and tax, that fee should always be related to the services rendered while tax is levied for the purpose of increasing the revenue of the State, that in this case the levy, originally started as measurement fee but later redesignated as supervision fee, still retains the character of a fee and that admittedly no services having been rendered in relation to the goods in

question by the Pondicherry Municipality, the levy cannot at all be sustained.

10. The learned Counsel is right in his submission that in our system of law, there is a clear-cut distinction between tax and fee, that while tax is levied as part of the common burden, a fee is a payment for a special service, benefit or privilege and that it is absolutely necessary that the levy of fees should always be correlated to the expenses incurred in rendering the service. But the question here is whether the impost in question is only a fee and not a tax as urged by the appellant, and whether the French Law which applied to Pondicherry Territory when the above impost was made for the first time recognised and took note of the distinction between a fee and a tax. There is considerable controversy between the parties on the question as to whether the impost is a fee or tax. While the appellant contends that it could only be a fee, the respondents contend that it is only a tax. On considering the relevant Municipal resolutions referred to above, we are inclined to think that even if the levy was originally made for certain services such as measurement and weighment of goods, the change brought about by redesignating it as a duty for supervision of the goods in circulation, should be taken to be significant in considering the nature of the impost. The word used both in the earlier notification, dated 26th December, 1910 and in the subsequent redesignation notification, dated 13th August, 1921 is "*droit*". The learned Counsel would construe this word in the first notification, dated 26th December, 1910 as a fee in view of the fact that at that time the Municipality had specifically established places for weighment and measurement and stated that any one paying the said "*droit*" referred to in that resolution will be entitled to demand services for measuring and weighing the goods concerned. But after the levy has been redesignated as a supervision "*droit*" it cannot be said that the Municipality contemplated offering any service in relation to the goods. As a matter of fact the learned Counsel concedes that the word "*droit*" used in the earlier resolution dated 26th December, 1910 as well as in the later resolution dated 13th August, 1921 has an indefinite import comprehending within its scope all levies such as fee, cess, tax, duty or any other impost. We are inclined to agree with the contention of the learned Additional-Solicitor-General that the later resolution, dated 13th August, 1921 is very significant in that the Municipality has chosen to change the head of levy, that the said resolution not having been challenged as invalid at any time, it should be taken that whatever was the nature of the levy prior to that resolution, the levy after the resolution could only be taken to be a tax, and that the language of the said resolution itself shows that what is collected is a tax and not a fee. We are not inclined to agree with the learned Counsel for the appellant that the impugned levy is in the nature of a fee and not a tax. It is true that initially when the impost in question was made, an option or privilege was given to the person concerned to have his goods weighed or measured by the Municipality free of cost. But later in the year 1921, the service has been totally disannexed from the levy by withdrawing the said option or privilege and then onwards it became a supervision duty on the goods in circulation without there being any *quid pro quo*. The learned Additional-Solicitor-General contends that the impost in question, being levied on the basis of unit and not on any quantitative basis it cannot be treated either as a measurement or weighment fee and that therefore, there is no idea of service in the matter of the levy of the impost in question. We are clearly of the view that even the measurement "*droit*" levied in pursuance of the resolution dated 26th December, 1910 cannot be taken to be a fee, for the option to have the goods weighed or measured given to the person concerned is not as a *quid pro quo* for the payment and the said option can at any tim be withdrawn and that at any rate after 1921 the impost by the Municipality is only a tax and not a fee for rendering any service to the goods such as measurement, weighment etc.

11. The distinction between a tax and a fee is taken as the basis by the appellant for challenging the impugned notification, dated 12th May, 1961. According to the learned Additional-Solicitor-General, the distinction between a tax and a fee is a federal concept and such a concept will not apply to the French system which is

not federal in character and the French system of law only recognised the distinction between direct and indirect imposts. In *Commissioner of Hindu Religious Endowment* v. *L.T. Swamiar*[1], it has been pointed out that the Constitution itself makes a distinction between a tax and a fee. There are a number of entries in the list I of 7th Schedule which relates to taxes and duties of various sorts and the last entry in that list *viz.*, Entry No. 96 speaks of fees in respect of any of the matters dealt with earlier in that list. Similarly entries 46 to 62 in the list II relate to taxes while the last entry, Entry 66 in that list deals with fees leviable in respect of matters specified earlier in the said list. Though levying of fees is only a particular form of exercising the taxing power of the State, our Constitution has placed fees under a separate category for purpose of legislation. Articles 110 and 119 specifically speak of fees for licences and for services rendered. It is in the context of these provisions of the Constitution, the Supreme Court felt that a fee cannot be equated to a tax and that both of them have got a different concept. It is because of the circumstance that our Constitution has, for legislative purposes made a distinction between a tax and a fee, the Court proceeded to treat 'tax' as denoting a separate concept from 'fee'. The question is whether the French Constitution makes a distinction between a tax and a fee. If it does not recognise any distinction between a tax and a fee and treats both the forms of exaction alike, we cannot import our notions of 'tax' and 'fee', while construing the provisions made by the statutory bodies functioning under the French Law. If there is no distinction between a fee and a tax under the French Law then the impugned levy is valid whether it is a measurement or weighment fee or a supervision charge. Dalloz in page 2 of his *code des lois politiques et administratives* under the head of Direct Taxes has set out various forms of tax. Items 8, 9 and 10 in that list deal with imposts for weighment, measurement and verification of alcometers and desimeters. If according to the learned Counsel for the appellant weighment and measurement '*droit*' is a fee, it would not have been possible for the author to include it in the list of direct taxes. This shows that even measurement or weighment fee is treated as tax under the French Law.

12. The learned Counsel for the appellant has not produced any authority or material to convince us that the French Law in fact recognises the distinction between a tax and a fee, and that a measurement and weighment charge is only a fee and not a tax. Even if a distinction between a tax and a fee existed in the French Law, the levy in question can in our view, be treated only as a tax and not a fee as urged by the appellant. The first resolution is dated 26th December, 1910. It proposes to levy a charge for measurement and weighment. It has not fixed any *quid pro quo* for the imposition of the levy. It merely gives a privilege to the person paying the charge of having his goods weighed or measured in the places set apart for that purpose. The payment is not conditional on the goods being weighed or measured. Hence it cannot be said that the charge levied under that resolution is purely for services to be rendered. In the subsequent resolution dated 13th August, 1921 the levy is brought under a different head which has no reference to any service such as weighment or measurement. The above resolution has not been challenged before us. In the subsequent resolution dated 16th Agugust, 1935 the charge is imposed by unit and not by weighment, and this shows that the impost has predominantly a tax element. We have, therefore, to hold that even if the distinction between a tax or a fee is imported into the taxing system under the French Law which treats both of them as direct taxes and the validity of the taxing provisions under the French Law is to be tested with reference to the said concept which arose as a result of the peculiar characteristics of the Indian Constitution, the various resolutions referred to above before or subsequent to 1921 show that the tax element is predominant and that there need not be any *quid pro quo* for imposing the levy in question. We, therefore, reject the contention of the appellant that supervision charges levied in this case are bad for the reason that no services are rendered by the Pondicherry Commune.

1. 1954 S.C.J. 325 : 1954 S.C.R. 1005 : (1954) 1 M.L.J. 596: A.I.R. 1954 S.C. 282.

13. The learned Counsel for the appellant then contends that if the levy in this case is treated as a tax, the Munci ality has no power to impose such a tax, that the Municipal Act of 1880 will not enable it to impose a charge of the kind in question and that the levy is, therefore, unauthorised and illegal. By a Decree dated 12th March, 1880 the French Government had set up Municipalities in the various French Settlements in India. Under that Decree the Territory of French India was divided into 17 Communes of which Pondicherry is one. The Pondicherry Commune is to have a Mayor, 3 Deputy Mayors and 18 Municipal Councillors. The Municipal Council can deliberate on all matters within its competence and all its deliberations on a subject outside its competence will be null and void, and the Governor in Privy Council shall declare its being null and void. Any resolution passed by the Municipal Council can be declared by the Governor to be null and void and the Municipal Council or any one of its members can also prefer an appeal before the "*Conseil d' Etat*" trying the disputed claims against the annulment order passed by the Governor. Chapter II of the said Decree deals with the powers of the Municipal Councils. Article 46 sets out the following matters among others: (1) the budget of the Commune and in general, all receipts and expenditure either ordinary or extraordinary; (2) the mode of assessment, rates and rules regarding collection of all municipal revenue except the dock dues as matters which could be deliberated upon by the Council. Article 47 provides that the deliberations of the Municipal Council on the matters enumerated in the preceding article which are forwarded to the Governor, shall be enforceable after the approval by the Governor in Privy Council. Article 48 enjoins the Municipal Council to give its opinion in respect of the following matters among others, mode of assessment, rates and rules relating to levy of Municipal tolls, dock dues and high road charges. Article 52 divides the receipts of the commune into two categories 'ordinary' and 'extraordinary' and the ordinary receipts of the commune shall comprise of, among other things, Municipal tolls weighing, measuring and gauging taxes lawfully established. Article 54 states that the budget of each commune submitted by the Mayor and voted by the Municipal Council shall be finally approved by an Arrete of the Governor in Privy Council.

14. The learned Counsel for the respondents contends that the law under which '*droit de surveillance des merchandises en circulation*" is being levied by the Pondicherry Municipality under the Municipal Resolution dated 12th May, 1961 lawfully passed in exercise of the taxing powers vested in the Municipal Council under entry 6 of the lists of Taxes reserved for the commune under Article 52 read with Article 46 (2) of the Municipal Decree, dated 12th March, 1880. It is said that the said Municipal Resolution has been duly approved by the Government in accordance with the procedure prescribed under Article 47 of the said Decree for the imposition of the taxes by the Municipal Councils. It is also pointed out that the tax presently levied and collected was under the name "*droit de surveillance des merchandises en circulation*", as per the resolution of the Municipal Council, dated 13th August, 1921. Before that date the tax was called "*droit de mesurage*" which was levied and collected as per the Arrete, dated 20th November, 1956 and was credited entirely to the State exchequer and the Commune had no share whatsoever in the proceeds realised. It is in pursuance of the revised scheme of distribution of taxing powers between the State and the Municipalities that the "*droit de mesurage*" stood transferred to the commune after 12th March, 1880. The said levy has been continued by the Municipality till date although the rate of taxation and the nomenclature of goods subject to the levy were amended from time to time according to the financial exigencies of the Municipality.

15. The learned Counsel for the appellant however points out that Article 52 read with Article 46 only deals with the procedure to be followed by the Municipality and that they do not deal with the power to levy a tax and that the decision of Ramaprasada Rao, J., upholding the validity of the levy under Article 52 (6) read with Article 46 of the Municipal Arrete of 1880 has ignored or overlooked the obvious distinction between the procedure and the authority to levy the tax.

According to the learned Counsel, Article 52 (6) can be taken only as enumerating all ordinary receipts of the commune, and it cannot be taken as providing the source of power to levy the tax. But on a due consideration of the matter, we are of the view that Article 52 should be taken as enumerating the various heads of taxes or sources of revenue on which the Municipal Council can deliberate. We are not inclined to agree with Mr. Venugopal for the appellant that apart from Articles 46 and 52, there should be a separate law enabling the Municipality to impose the taxes contemplated under the various items in Article 52. The learned Counsel draws our attention to the last clause under the head 'ordinary receipts' which is as follows:

> "And, generally, the proceeds from all town-dues and Police taxes the levy of which is authorised by rules."

He contends that it supports his stand that there should be some other statutory provision enabling the tax in question to be levied by the Municipality. But we do not understand the aforesaid clause as requiring a separate law authorising the Municipality to enforce the various matters referred to under the head 'ordinary receipts' in Article 52. After listing out the various items of ordinary receipts on which the Municipal Council can deliberate, the above clause sets out that the Municipality can also collect all town-dues and police taxes the levy of which is authorised by rules embodied in the arretes of the Governor made in Privy Council in consultation with the concerned Municipal Councils and the Council General. Article 52 enumerating the heads of receipts is to be treated as the list of items in respect of which the Municipal Council can impose a levy. Article 46 (2) enables the Municipal Council to deliberate on the mode of assessment, and the rates and frame rules regarding the collection of all municipal revenue. The word 'municipal revenue' occurring in Article 46 (2) clearly attracts clause 52 which sets out the various items of municipal revenue. Apart from Article 52 we do not see any other provision in the Municipal arrete of 1880 which specifically confers on the Municipal Council the power to levy a tax. We do not, therefore, see any necessity for a separate law conferring on the Municipality the power to levy Municipal Tolls, weighing, measuring and gauging taxes and taxes connected with roads. Such a power can clearly be gathered from item 6 of Article 52. As already stated, the power to levy a measurement tax had been given to the local Government under clause 34 of the arrete of the Governor dated 20th November, 1856. Article 36 of the same arrete exempted goods introduced into the commune by parties for their personal consumption and also goods which have already suffered such tax in any one of the French Settlements. The arrete dated 26th December, 1856, regulated the collection of measurement tax in Pondicherry and Article 1 of that arrete fixed the rate of measurement tax for certain articles on the quantitative basis. The power to levy a measurement tax was given under the Decree dated 12th March, 1880 to the Municipalities in the French Settlements including the Pondicherry Commune. Later on 13th August, 1921, the Municipal Council of Pondicherry changed the head of taxation and redesignated it as "*droit de surveillance des merchandises en circulation*" and ever since that date the tax under that head is being levied by the Pondicherry Commune on various goods including cotton, cloth, yarn etc. The appellant has challenged only the resolution dated 12th May, 1961, which only refixed the rates of levy for various commodities. It is only this notification which has been challenged on the ground that the Municipality had no power to impose the tax in question. We have already expressed the view that the levy is authorised by item 6 of Article 52 read with Article 46 and that the learned Counsel is not right in his submission that those Articles only provide the procedure for levy of tax and they do not themselves authorise the levy of taxes. We have already pointed out that Ramaprasada Rao, J., had held that the procedure contemplated by the Municipal Act of 1880 has been duly followed. This finding of the learned Judge has not been questioned before us. The appellant's learned Counsel is questioning the authority of the Municipal Council to levy such a tax, though he concedes that the Municipality has followed the

procedure contemplated by the Municipal Act of 1880 in imposing the charge. According to the learned Counsel, the Municipal Council is only a statutory body without any legislative power and it can act only within the four corners of the Municipal Act of 1880. But we have earlier held that the Municipal Act of 1880 gives the Municipal Council the power to levy the tax in question in view of item No. 6 of Article 52 read with Article 46 (2) of that Act. The words 'and other taxes lawfully established' occurring at the end of item 6 of Article 52 suggest that the earlier items, municipal tolls, weighing, measuring and gauging taxes and taxes connected with roads are all duly established.

16. The learned Counsel for the appellant draws our attention to a decision of Ramakrishnan, J., in *Parthasarathy* v. *State of Pondicherry*[1], in support of his plea that the well known principles laid down for distinguishing tax from fee has to be applied in testing the validity of the impost in this case. In that case the Municipal Council of Karaikal had passed a resolution on 4th November, 1963, which was approved by the State of Pondicherry on 2nd April, 1964, authorising the Municipality to collect the fees at the bus stand, the rates depending upon the seating capacity of the buses which are parked there. The said levy was successfully challenged on the ground that the rates fixed bore no reasonable relation between the levy and the services rendered and that the pre-existing law granting power to the Municipalities to impose levy for granting licences to use parking places contemplated only the levy of licence fee commensurate to the services rendered and not the right to levy an arbitrary tax. But we find that the learned Judge in that case was construing Article 44 which deals with the power of the Municipal Council to regulate certain matters through resolutions. Naturally, therefore, the learned Judge construed that regulating power as enabling the Municipality under Article 44 (6) to levy a fee. We are however concerned in this case with the scope of Article 52 (6) read with Article 46 which deal with the power of the Municipality to raise the revenues under the various heads and the mode of collection of those revenues. We cannot, therefore, get any support from the above decision.

17. Though we have upheld the authority of the Municipality to impose the levy in question in this case under Article 52 (6) read with Article 46 (2) of the Decree of the year 1880, we consider it necessary to deal with one other contention put forward by the learned Additional Solicitor-General on behalf of the respondents. Apart from sustaining the authority of the Municipality to impose the tax under the Municipal Act, 1880, he contended that even assuming that the Municipal Council had in fact no power to levy the tax of the kind in question on the basis of Article 52 (6) read with Article 46 (2) as contended by the learned Counsel for the appellant, still the levy purporting to have been made under the Municipal Decree of 1880 should be held to be justified by section 7 of Central Act XLIX of 1962. It is pointed out that the levy of the tax in question has been in vogue at least from 1856 under the caption "*droit de measurage*" and after 1921 under the caption "*droit de surveillance des merchandises en circulation*", that the said levy has not been challenged at any time by any one, that it has been accepted and approved as a valid levy by the Governor, that it has not been declared void under Article 33 of the Decree of 1880 and that none questioned the levy by filing an appeal before the "*Conseil d' Etat*", the only authority competent to pronounce against the validity of the levy. It is stated that the impost had been deliberated upon by the Municipal Council under Article 46 (2) read with Article 52 (6) and recommended to the Governor who had given the requisite approval, that the resolution had been duly gazetted and that all the legal formalities contemplated by the Municipal Decree of 1880 had been gone through. As the levy had been continued all these years without demur from any quarter it should be taken that all concerned proceeded on the basis that the Municipal Decree of 1880 authorised the imposition of the levy. Reference is made by the learned Additional Solicitor-General to certain passages from Crawford and Craies. Crawford on 'The Construction of Statutes' says at page 388 as follows:—

1. 1965 M.W. N. 328.

"Where the meaning of a statute is in doubt, the Court may resort to contemporaneous construction—that is, the construction placed upon the statutes by its contemporaries at the time of its enactment and soon threafter—for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment and acqui sced in by the Courts and the legislature for a long period of time. As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation.................. To be sure, contemporaneous construction may not be controlling, yet it is obviously entitled to considerable weight, especially where men have acted under a particular interpretation of the statute for a long time. Such a construction should not be rejected by the Courts except for strong and forcible reasons, nor is such a construction to be lightly overturned."

The same author at page 393 says:—

"Where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative Officers who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long period of time and generally or uniformly acquiesced in, it will not be disregarded by the Courts, except for the most satisfactory, cogent or impelling reasons. In other words, the administrative construction generally should be clearly wrong before it is overturned. Such a construction commonly referred to as practical construction, although not controlling is nevertheless entitled to considerable weight. It is highly persuasive."

18. Craies on Statute Law says at page 141 that light may be thrown upon the meaning of an obscure enactment by taking into consideration the construction which for a long period of time has been put upon it. At page 144 the learned author says thus:—

"when there are ambiguous expressions in an Act passed two or three centuries ago it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested as evidence of what must presumably have been the intention of the legislature at that remote period."

19. In a similar case where the validity of port dues were questioned, Stirling L. J., expressed in *Asheton Smith* v. *Owen*[1], as follows:—

"I will only add that the rates and dues were paid by the plaintiff's predecessors-in-title in respect of ships laden or unladen at Fort Dinorwic without dispute for a long period and down to a time shortly before bringing this action. This circumstance, though it may not preclude the plaintiff from questioning the right to levy rates or dues, yet as pointed out by Lord Blackburn in *Clyde Navigation Trustees* v. *Laird*[2], may well render the Court cautious in holding that such right did not exist."

20. In *Migneault* v. *Malo*[3], the question arose as to whether the grant of probate was conclusive on the question of the genuineness of the Will and whether it is open to the legal heir of the testator to impugn the Will. Though under the English Law, grant of probate is conclusive on the question of genuineness of the Will, a practice has been followed in Canada of not taking the grant of probate as conclusive and subjecting the probate to proof. The Privy Council expressed the view that they cannot disregard the practice followed by the Canadian Courts with respect to it for the last 70 years. At page 139, the Privy Council observed as follows:—

"Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in England and that according to that interpretation it was com-

1. (1906) 1 Ch. 179.
2. (1883) 8 App. Cas. 658.
3. (1871) 4 Law Rep. 123 (P.C.)

petent to the respondent to impugn the validity of this Will by way of defence to the action brought by the appellant for the payment of the annuity".

The learned Counsel for the respondents therefore, urges that all the parties concerned had proceeded on the basis that Article 52 (6) read with Article 46 (2) enabled the Municipality to levy the tax, as it is only on that basis the levy has been made by the Municipality and continued without demur from 1880 and that such interpretation of Articles 46 (2) and 52 (6) by the concerned authorities in the year 1880 which has not been questioned till now, should, therefore, be accepted.

21. The learned Counsel for the appellant however, contends that there can be no question of acquiescence in the matter of tax and the tax-payer can challenge the levy even if he had not demurred to the payment earlier. It is true that there is no question of acquiescence and the tax-payer cannot be prevented from raising the question of validity as and when he realises the illegality of the levy. But the question here is whether Article 52 (6) has been understood by the parties concerned as authorising the Municipality to levy weighment or measurement tax. As submitted by the learned Additional Solicitor-General, tax has been levied practically from the year 1880 and the levy could be traced only to Article 52 (6). The approval by the Governor of the levy made by the Municipality and the levy not having been challenged before the prescribed administrative tribunals shows that everyone concerned proceeded on the basis that the tax is properly leviable under item 6 of Article 52 and therefore the long and established interpretation of item 6 of the Article should be accepted. We are inclined to agree with the above submission of the learned Counsel. Right from the year 1880 when the Decree was passed by the President of the French Republic, Article 52 (6) of that Decree has been construed as dealing with the various heads of taxation which the Municipality is entitled to impose and the tax in question not having been challenged on the ground that the taxing power has not been traced from that item, we must give such a construction to Article 52 (6) as would accord with the long usage and the belief which the persons concerned entertained. We, therefore, hold that the levy in this case, has been duly authorised and that, therefore, it is validly continued under section 7 of the Central Act XLIX of 1962.

22. The Writ Appeal is, therefore, dismissed with costs. Counsel's fee Rs. 250.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P.S. Kailasam and N.S. Ramaswami, JJ.*

Perumal and others .. *Appellants**

vs

G. Ellusamy Reddiar and another .. *Respondents*

Motor Vehicles Act (IV of 1939), *section* 110-A—*Madras Motor Accidents Claims Tribunal Rules* (1961), *Rule* 2 (c)—*Accident due to mechanical break-down—Doctrine of* res ipsa loquitor—*Duty on the defendant to show that repairs were carried and regularly—Break-down only a neutral factor—Sections* 110 *to* 110-*F of the Motor Vehicles Act—Procedural, not creating substantive rights—"Legal representative" in section* 110-A—*Meaning of —Rule* 2 (c) ultra vires *the Act—Accident a tortious act—Provisions of the Fatal Accidents Act apply to applications under section* 110-A *of the Motor Vehicles Act—Loss of life—Compensation—Loss of future happiness.*

Per *N. S. Ramaswami, J.*—

The doctrine of *res ipsa loquitor* means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case, the mere fact of the accident is *prima facie* evidence of such negligence. Then the burden of proof is on the defendant to explain and to show that it occurred without fault on his part. [*Para.* 6.]

In the case of a mechanical break-down unless the def ndant satisfies the

* A.A. O. No. 15 of 1969. 2nd *August*, 1973.

Court that he arranged periodical check-up and carried out necessary repairs regularly and that he did everything in his power to eliminate mechanical unsoundness, the break-down would be only a neutral factor and not a valid defence. [*Para.* 7.]

Even in respect of claims before the Motor Accidents Claims Tribunal, one has necessarily to look to the provisions of the Fatal Accidents Act because the provisions of the Motor Vehicles Act do not create substantive rights but they are only procedural in character. [*Para.* 8.]

The Tribunal making an award "determining the amount of compensation" which appears to it to be just "has naturally to look to the law of torts" in determining such compensation. The claimants have necessarily to prove that the owner of the motor vehicle concerned was guilty of a tortious act, either directly or vicariously, resulting in the accident. [*Para.* 10.]

The amendment to the Motor Vehicles Act by Act LVI of 1969 makes it abundantly clear that sections 110 to 110-F of the Motor Vehicles Act are only procedural in character and they do not deal with substantive law. They have nothing to do with the substantive rights and liabilities of parties. The term "legal representative" occurring in section 110-A of the Act has a wider import than the definition of the term contained in section 2 (11) of the Code of Civil Procedure and rule 2 (*c*) of the Madras Motor Accidents Claims Tribunal Rules, 1961 made by the State Government is beyond its rule-making power and therefore it should be struck down. The term "legal representative" occurring in section 110-A of the Act takes in persons covered by the term "representative" occurring in section 1-A of the Fatal Accidents Act. The term "representative" occurring in section 1-A of the Fatal Accidents Act should be understood as referring to next of kin who are the dependants of the deceased as contemplated under that Act. The term "representative" occurring in the Legal Representatives Suits Act should refer to persons who represent the estate of the deceased and that need not take in next-of-kin who would be dependants of the deceased under the Fatal Accidents Act but may not be persons who represent the estate of the deceased. Therefore the word "representative" occurring in section 1-A of the Fatal Accidents Act, and the same term occurring in the Legal Representatives Suits Act need not have the same meaning. [*Paras.* 23, 24, 26, 27, 30.]

The term "legal representative" in section 110-A of the Motor Vehicles Act should take in all persons who can maintain an action under the Legal Representatives Suits Act or under section 2 of the Fatal Accidents Act as the case may be as well as those who can maintain an action under section 1-*A* of the Fatal Accidents Act. That being so, one cannot restrict the meaning of the term 'legal representatives" occurring in section 110-A of the Motor Vehicles Act as that in section 2 (11) of the Code of Civil Procedure. The attempted definition under rule 2 (*c*) of the Madras Motor Accidents Claims Tribunal Rules is not necessary for the purpose of carrying into effect the provisions of sections 110 to 110-B of the Motor Vehicles Act. [*Paras.* 32 and 34.]

By the mere use of the words "compensation which appears to it to be just" in section 110-B of the Motor Vehicles Act, the relevant provisions of the Act (sections 110 to 110-F) cannot be said to create new rights or liabilities. These provisions in the Act are not meant to alter or amend the pre-existing law relating to the substantive rights and liabilities of the parties. [*Para.* 37.]

In respect of applications under section 110-A of the Motor Vehicles Act for the death of a person in a motor accident, the claimant must prove that the accident amounted to a tortious act and if that is proved, compensation can be awarded for loss of benefit to the claimants if they are dependants as contemplated under the provisions of the Fatal Accidents Act and compensation can also be awarded towards, loss to the estate of the deceased, whether the claimants are dependants under the Fatal Accidents Act or not. [*Para.* 48.]

On the ground of loss of expectation of life, compensation is to be assessed

only for the loss of future happiness and such assessment should be of a moderate amount. [*Para.* 52.]

Per *Kailasam, J.*—The term "legal representative" can be construed as including all claimants under section 110-A of the Motor Vehicles Act. [*Para.* 66]

Cases referred to :—

R. v. *Spruge,* (1961) 2 All E.R. 688; *Selvaraj* v. *Jagannathan,* (1968) 81 L.W. 386; *Shwe Mya* v. *Maung Ho Haaung,* (1923) 44 M.L.J. 732; A.I.R. 1922 P.C 359; 49 I.A. 395; *Andhra Bank Ltd.* v. *Srinivasan,* A.I.R. 1962 S.C 232: (1962) 2 S C.J. 676: (1962) 3 S.C.R . 391: (1963) 1 M.L.J. (S.C.) 14 : (1963) 1 An.W.R. (S.C.) 14; *Dinamoni Chaudhurani* v. *Elahadut Khan,* (1904) 8 Cal.W.N. 843; *M. Ayyappan* v. *Moktar Singh,* (1969) 2 Mys.L.J. 264 : 1969 A.C.J. 439 : A.I.R. 1970 Mys. 67; *M. Basavalingiah* v. *T.P Papanna,* (1971) 2 Mys.L.J. 351 : 1971 A.C.J. 404 ; *Kasturi Lal* v. *Parabhakar,* (1970) A.C.J. 1; *Palani Ammal* v. *The Safe Service Ltd.,* (1966) A.C. J. 19 ; *Kamla Devi* v. *Kishan Chand,* (1970) A.C.J. 310: A.I.R. 1970 M.P. 168; *Shri Ram Pertap* v. *Punjab Roadways, Ambala,* A.I.R. 1962 Punj. 540 ; *Ariyamma* v. *Narasimhiah,* (1972) A.C.J. 22; *Orissa Co-operative Insurance Society Ltd.* v. *Bhagaban Sahu,* (1971) A.C.J. 49 ; *Oriental Fire and General Insurance Co., Ltd.* v. *Kamal Kamini Das,* (1972) A.C.J. 92; *Amarjit Kaur* v. *Vanguard Insurance Co., Ltd.* (1969) A.C.J. 286; *P.B. Kader* v. *Thatchamma,* A.I.R. 1970 Ker. 241; *Mohammed Habibullah* v. *Seethammal,* (1966) A.C.J. 349; *Kanglu Balua* v. *Chief Executive Officer,* A.I.R. 1955 Nag. 49; *R x* v. *Charles Leslie Norman,* L.R. (1924) 2 K.B. 315; *Nicholas* v. *Penny,* L.R. (1950) 2 K.B. 466; *Abdul Malick* v. *Collector of Dharmapuri,* (1968) 1 M.L.J. 9; *Veena Kumari Kohli* v. *Punjab Roadways,* (1967) A.C.J. 297; *Gobald Motor Service Ltd.* v. *R.M.K. Veluswami,* A.I.R. 1962 S.C.1 : (1962) 1 An.W.R. (S.C.) 105: (1962) 1 M.L.J. (S.C.) 105: (1962) 1 S.C.J. 206: (1962) M.L.J. (Crl.) 120: (1962) 1 S.C.R. 929; *Ram Pratap* v. *Punjab Roadways,* A.I.R. 1962 Punj. 540; *Ishwari Devi* v *Union of India,* 1968 A.C.J. 141; *W.S. Bhag Singh & Sons* v. *Om Parkash Kaith,* 1971 A C.J. 324; *Damyonti Devi and others* v. *Sita Devi,* 1972 A.C.J. 334; *M.A. Rahim* v. *Sayari Bai,* (1972) 2 M.L.J. 347: A.I.R. 1973 Mad. 83; (1972) A.C.J. 470; *Chinnapponnu Ammal* v. *T.N. Mooka Pillai,* 1968 A.C J. 24; *Flint* v. *Lovell* (1935) 1 K.B. 354; *Rose* v. *Ford,* 1937 A.C. 826; *Benham* v. *Gambling,* (1941) A.C. 157; *Yorkshire Electricity Board* v. *Naylor,* 1968 A.C. 529; *Burns* v. *Edman,* (1970) 2 Q.B. 541; *T.V. Gnanavelu and another* v. *D.P. Kannayya and others,* A.A.O No. 35 of 1965; *Rose* v. *Ford,* 1937 A.C. 826; *Johnson* v *The Madras Railway Co.,* (1905) I.L.R. 28 Mad. 479; 15 M.L.J. 479 ; *Mrs. R.V. Penheiro* v. *M. Minney,* A.I.R. 1934 Cal. 655.

Appeal against the order of the Motor Accidents Claims Tribunal, Madras, dated 13th March, 1968 and made in O.P. No. 225 of 1965.

Syed Ahmed, for Appellant.

K. Kesavanath Davey, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—The claimants in O.P. No. 225 of 1965 before the Motor Accidents Claims Tribunal, Madras, whose petition has been dismissed, are the appellants. The three appellants are the brothers and sister of one Kadirvelu who was killed in a motor accident which occurred at about 1 P.M on 25th August, 1965 in Ghantz Road, Madras. The lorry bearing registration No. MDJ 2172 owned by the 1st respondent is the vehicle which was involved in the accident. Kadirvelu was actually standing on the steps of a tea shop off the pedestrian pavement east of the road and the lorry in question swerved, went over the pavement and knocked against the said tea shop, in the process jamming Kadirvelu to death. The appellants claimed a total sum of Rs. 40,000 as compensation, making the owner of the vehicle and the insurer thereof as respondents 1 and 2 respectively. The two respondents contested the petition and the Tribunal came to the conclusion that the accident was not due to any negligence or rashness on the part of the dirver of the lorry, that it was an inevitable accident due to an unforeseen mechanical defect and that therefore the claimants are not entitled to any compensation. The Tribunal also gave a finding that if the claimants are entitled to compensation on the ground that the accident was a result of rash or negli-

gent driving of the vehicle, a sum of Rs. 5,400 would be the just compensation payable to them. But the petition came to be dismissed on the ground that there was no rashness or negligence on the part of the driver of the lorry. Therefore the claimants have filed this Civil Miscellaneous Appeal pressing their claim.

2. The first question that arises for consideration is whether the accident was as a result of negligence. The road in question runs north to south and the width of the road as spoken to by P.W. 3, the police officer who visited the scene after the accident, is 28 feet 9 inches. On the eastern side of the road there is a pedestrian pavement, 4 feet wide. There is a tea shop called Gopal Tea Stall east of the pavement. Kadirvelu (since deceased) was standing on the steps just in front of the said tea shop, facing the same (facing eastwards) and taking tea. It was then the lorry, which proceeded from north to south in the road, swerved, jumped over the pavement and dashed against the tea stall, in the process of which Kadirvelu was caught between the lorry and the tea stall and crushed to death.

3. The accident is spoken to by Arumugam (P.W. 5.) on behalf of the claimants and Kandan (R.W. 1.) who was the driver of the lorry, on behalf of the respondents. We have also the evidence of P. W. 3, the police officer who visited the scene sometime after the accident and he has drawn a plan as per Exhibit P-1 showing the tyre marks and other particulars.

4. P.W. 5 was also near the tea shop in question and he was also injured in the accident, but he escaped with minor injuries. All that he says is that while himself and the deceased were taking tea facing the tea stall and standing on the steps close to the same, the lorry came and hit them. He added that there was no sounding of horn by the lorry at about the time of the accident. R.W. 1 the driver of the lorry, stated that he was driving the lorry from north to south, that the lorry was empty (*i.e.*) without any load, that two bullock carts were going ahead of the lorry, that he overtook the said two bullock carts by going to his right side (western side of the road), that after he so overtook the two carts, he wanted to bring the lorry to the centre of the road, that then the steering began to wobble, that the steering wheel turned left and could not be brought to the normal position, that when he applied the brakes they failed and that therefore the vehicle got over the platform on the eastern side of the road and dashed against the tea shop, only after which the vehicle came to a stop. P.W. 3 the police officer, stated that he found tyre marks to a distance of 56 feet from the place of impact, that the said marks were straight (north to south) to a certain distance and then it took a turn across the road diagonally up to the place of impact. The left front wheel was found detached and lying on the left side of the lorry in between the steps of two adjacent shops off the pedestrian pavement. The front part of the tea shop in question, as well as the southern wall of an adjacent stall were found badly damaged. This witness also stated that the brakes of the vehicle were found to be efficient.

5. The respondents examined one Velayutham, who is an automobile Engineer, as R.W. 2 to give opinion evidence in order to support their case that the accident was as a result of a sudden mechanical breakdown. The witness explained as to how the left front wheel in the vehicle could have come out from its position. He stated that in case the nuts had come out of the sub-axle, the wheel would start to come out by a few inches before it finally drops out. According to him, it is possible that nuts may come out unnoticed by the driver. The sub-axle being about 6 inches long, before the wheel comes out completely and falls down, it would be rolling on the bearing even after the nuts had slipped, but in that position the brakes would not act. He added that accidents do happen due to slipping of sub-axle nuts. It was also sought to be made out through his evidence that the coming out of the front left wheel was not due to the impact itself. The witness stated that had the wheel come out due to the impact, the bearings as well as the hub would have been broken and the threads of the sub-axle would be wiped away completely. As it it is not in evidence that either the bearings or the hub was found broken

or about the sub-axle threads having been wiped away, it was sought to be made out through the evidence of R. W. 2 that the coming out of the left front wheel of the lorry was not due to the impact but it was only due to a latent mechanical defect.

6. As I said, the Tribunal below held that the accident was a result of the mechanical defect and the accident was not due to any negligence or rashness. But on a careful consideration, I am unable to accept the finding of the Tribunal below on this point. There are two aspects of the question. The first is whether the accident was due to rash or negligent driving by R.W. 1, the driver of the vehicle. The second is, even if the accident was a result of mechanical defect, whether reasonable care had been taken to prevent such breakdown resulting in the accident. The lorry had admittedly gone out of the road, jumped over the pavement and attacked the deceased who was actually standing on the steps of the tea stall. Under such circumstances, the doctrine of *res ipsa loquitur* would come into play. It is then, the burden shifts on to the respondent to prove that the accident was not due to negligence. The doctrine of *res ipsa loquitur* means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case, the mere fact of the accident is *prima facie* evidence of such negligence. Then the burden of proof is on the defendant to explain and to show that it occurred without fault on his part. I will assume in this case that the coming off of the left front wheel was not due to the impact itself but because of the sub-axle nuts breaking or slipping all of a sudden. But the respondent cannot escape liability by merely showing that the accident was as a result of a mechanical defect. He should further show that he took reasonable care to avoid such mechanical defect. There is no evidence as to whether the sub-axle nuts broke or slipped.

7. Bingham in *Motor Claims Cases* (6th Edition, page 183) points out that if an accident is due to a latent defect which is not discoverable by reasonable care, there is no negligence. Therefore it is not enough for the respondent to prove that the accident is due to latent defect, but he must further prove that the said defect was not discoverable by reasonable care. Regarding cases of mechanical defect causing accident, it is pointed out in *R. v. Spruge*[1], that the defence of mechanical defect has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. In the present case, no doubt, there is no evidence to show that the defective nature of the sub-axle nuts was known to the driver or the owner of the vehicle. But the matter does not rest there. It must be shown by the respondent that the defect could not be detected in spite of exercise of reasonable care. In the case of mechanical break-down unless the defendant satisfies the Court that he arranged periodical check-up and carried out necessary repairs regularly and that he did everything in his power to eliminate mechanical unsoundness, the break-down would be only a neutral factor and not a valid defence. In the present case, there is absolutely no evidence to show that the 1st respondent took any care to avoid the mechanical defect. R. W. 1 the driver of the lorry, said that he did not know whether the mechanism was ever checked. Therefore I think the 1st respondent has not discharged his burden of rebutting the presumption arising from the doctrine of *res ipsa loquitur*.

8. The next point to be considered is whether the appellants, who are the brothers and sister of Kadirvelu (since deceased) are persons entitled to claim compensation under section 110-A of the Motor Vehicles Act (hereinafter referred to as the Act). The contention on behalf of the respondents is that in view of the fact that the appellants are not dependants under section 1-A of the Fatal Accidents Act, they cannot maintain any claim for compensation regarding the death of Kadirvelu. *Per contra*, the contention on behalf of the appellants is that the provisions of the Fatal Accidents Act have no application to a claim before the Motor accidents Claims Tribunal, that the provisions under the Motor

1. (1961) 2 All E.R. 688.

Vehicles Act give a right to all legal representatives of the deceased to maintain to claim for compensation, that the term "legal representatives" occurring in section 110-A of the Act would take in the brothers and sister of a deceased who died a bachelor and that therefore their claim cannot be negatived on the ground that they are not dependants as defined under section 1-A of the Fatal Accidents Act. I am of the opinion that neither of the contentions is correct. Even in respect of claims before the Motor Accidents Claims Tribunal, one has necessarily to look to the provisions of the Fatal Accidents Act because the provisions of the Motor Vehicles Act do not create substantive rights but they are only procedural in character. Even so, the appellants being the brothers and sister of the deceased, are not wholly without remedy. Though they are not entitled to compensation for loss of benefit as they are not dependants under section 1-A of the Fatal Accidents Act, they would be entitled to claim compensation towards loss of estate of the deceased as persons who represent his estate.

9. The contention on behalf of the appellants proceed on the footing that sections 110 to 110-F of the Act create substantive rights and that they are not merely procedural. It is on that basis it is contended that in respect of claims under section 110-A of the Act, one should not look to the provisions in the Fatal Accidents Act in order to determine whether the claimants are entitled to compensation and if so, to what amount. On an examination of all the relevant provisions, I am quite clear that sections 110 to 110-F of the Act do not purport to change the substantive law under which persons can claim compensation for either death or injury caused by tortious acts. First of all, it must be noted that sections 110 to 110-F of the Act do not say that in every case of accident (whether the accident is as a result of tortious act or not), the injured or the legal representatives of the deceased, as the case may be, are entitled to compensation. Undoubtedly the substantive right to claim compensation is only under the general law of torts. It cannot be disputed and, as a matter of fact, it is not disputed that either an injured or the legal representatives of the deceased, as the case may be, should establish that the accident was as a result of rashness or negligence on the part of the owner of the motor vehicle or his servant, before ever they can claim compensation in respect of the accident. That being so, merely because section 110-A says that either the injured person or the legal representatives of the deceased, as the case may be, can file application for compensation and section 110-B says that the Claims Tribunal may make an award determining the amount of compensation which appears to be just, it cannot be claimed that any new right is created under these provisions.

10. The Tribunal making an award "determining the amount of compensation which appears to it to be just" has naturally to look to the law of torts in determining such compensation. If the owner of the vehicle is not a tort-feasor, then, in spite of the accident causing either injury or death, as the case may be, no compensation can be awarded by the Tribunal. Therefore, the mere fact that the section says that the Tribunal would determine the amount of compensation which appears to it to be just, does not mean that any new right is created to the claimants. The claimants have necessarily to prove that the owner of the motor vehicle concerned is guilty of a tortious act, either directly or vicariously, resulting in the accident.

11. It is stated that in the latest amendment of the Act, section 95 has been so amended in order to create an absolute liability in respect of injuries caused to passengers in public service vehicles. Section 95 of the Act is the one which specifies the requirements of the insurance policies to be taken in respect of motor vehicles. Section 95 (1) (*b*) as it originally stood stated that the insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of or, bodily injury to, any person caused by or arising out of the use of the vehicle in a public place. There is also a proviso to this clause 95 (1) (*b*) but that need not be referred to now. By Act (LVI of 1969), section 95 (1) (*b*) has been substituted by a new

clause. As far as it is now material, it is as follows:—

"95. (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(*a*) * * * * *

(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2).

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

* * * * *"

As in the new clause (*b*) (i) it is stated that the insurance is to be against any liability which may be incurred by the person or classes of persons specified in the policy but clause (*b*) (ii) simply says that the insurance is to be against the death of or bodily injury to any passenger of a public service vehicle, without referring to any liability which may be incurred by the person or classes of persons insured in respect of such death of or bodily injury to any passenger, it is said that under the abovesaid clause, *viz.*, new clause (*b*) (ii), an absolute liability in respect of passengers travelling in a public service vehicle has been created. In this connection, the statement of objects and reasons for the Amending Act (LVI of 1969), which introduced the abovesaid new provision, is pointed out. In paragraph 6 of the said objects and reasons it is stated that the bill seeks to provide for covering of passenger risks for public service vehicles irrespective of the culpability of the owner or driver of such vehicle for any accident in which it may be involved, provided that there was no contributory negligence on the part of the victim. From this it is stated that even though the driver of a public service vehicle might not have been rash or negligent in respect of the accident in which any of the passengers in the vehicle is injured or dead, the insurer shall be liable to pay compensation to such victims. Though the statement of objects and reasons mentioned above supports the above view, whether the said object has been achieved or not has to be examined.

12. Assuming without deciding that the new section 95 (1) (*b*) creates an absolute liability in respect of injury or death to passengers in a public service vehicle, that has nothing to do with the present question, for two grounds, *viz.*, this amendment comes into effect only in the year 1969 and (2) the absolute liability, if any, is only in respect of passengers in a public service vehicle. In the present case, we are not concerned with any passenger who was injured or dead in the accident.

13. This is a case where a lorry attacked and killed a person who was standing on the pedestrian pavement. If really the present section 95 (1) (*b*) creates an absolute liability in respect of passengers in a public service vehicle, that fact would only highlight the position that in respect of other claimants there is no question of absolute liability and that the claimants can succeed only by proving that the injury or the death, as the case may be was due to tortious act on the part of the owner of the motor vehicle, either directly or vicariously.

14. If one has necessarily to look to the law of torts, then it must be remembered that before the coming into force of the Legal Representatives Suits' Act, 1855 (XII of 1855) and the Indian Fatal Accidents Act (XIII of 1855) under the maxim of *actio personalis moritur cum persona*, no action could be maintained by any one in respect of the death of a person, even though the death had been caused by the defendant by committing a tortious act. The maxim which means "a personal claim dies with the person" is a general rule applicable to torts and prevents representatives of the deceased from suing in his right for the suffering and pecuniary loss caused to the deceased during his lifetime by reason of the injury of which the deceased ultimately died. The result was that the person who caused the death of other cannot be sued in tort,

though if death had not been caused but only injury had been caused, the injured would be entitled to sue and recover damages for the tortious act. The position was "it was cheaper to kill than to maim or cripple". In England, the above unsatisfactory state of law was overcome by the passing of the Law Reforms Act and of the Fatal Accidents Act, 1846, which is commonly known as Lord Campbell's Act.

15. The Indian Fatal Accidents Act (XIII of 1855) followed the above English Act of 1846. Under section 1-A of the Fatal Accidents Act, a new right is created in favour of certain dependants who are named therein, to maintain an action or suit for damages in respect of the death of a person. The dependants for whose benefit an action can be maintained under section 1-A of the Act are the wife, husband, parents (which term includes not only father and mother but also grandfather and grandmother) and child (which term includes not only son and daughter but also grandson and grand-daughter and step-son and step-daughter). This Act *viz.*, the Indian Fatal Accidents Act and the Legal Representatives' Suits Act of 1855 came into force on one and the same date, *viz.*, 27th March, 1855.

16. Under the Legal Representatives' Suits Act (XII of 1855) which corresponds to the Law Reforms Act in England the cause of action in respect of loss to the estate of a person whose death had been caused (by tortious act) is made to survive and be available to the executors, administrators or representatives of the deceased. The long title of of this Act is "An Act to enable executors, administrators, or representatives to sue and be sued for certain wrongs". The preamble says that whereas it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives, the law is enacted.

17. It must be remembered that the claim on behalf of the dependants mentioned in section 1-A of the Fatal Accidents Act is entirely different from what is compendiously called "loss of estate of the deceased". Under section 1-A, compensation is claimable in respect of loss of benefit to the dependants mentioned therein. But it is under the other Act, *viz*,. the Legal Representatives' Suits Act, 1855 the cause of action regarding loss of estate was made to survive to the executors, administrators or representatives of the deceased. If the person wronged does not die as a result of the wrong-doing, under the general law of torts he always has the right to maintain an action for loss of estate (I will come to the question what exactly is the loss of estate, a little later). Before the passing of the Legal Representatives' Suits Act, such right to loss of estate died with the wronged and the same did not survive to the executors, adminstrators or representatives of the deceased. After the passing of the said Act, the executors or administrators or representatives of the deceased, as the case may be, can maintain a suit for loss of estate of the deceased.

18. The Fatal Accidents Act, 1855 comtemplates that there should be only one action or suit for loss of benefit in respect of a wrongful act. That is the first part of section 2 of the said Act which says: "Provided always that not more than one action or suit shall be brought for, and in respect of the same subject-matter of complaint". If a person dies of a tortious act, there could not be one action for the loss of benefit to one of the dependants as contemplated under section 1-A of the said Act and a separate action for loss of such benefit to another dependent, though a separate suit or action for the loss of estate can be brought by the executors or administrators or representatives of the deceased, as the case may be. But the second part of the abovesaid section 2 of the Fatal Accidents Act is an enabling provision by which in any suit or action for the loss of benefit to the dependants as contemplated under section 1-A a claim in respect of loss of estate can also be inserted by the executor, administrator or representative of the deceased, as the case may be. The second part of section 2 of the Fatal Accidents Act says: "Provided that in any such action or suit, the executor, administrator or representative

of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased".

19. In the whole of the Fatal Accidents Act, the reference to the loss of estate is only in the above provision. It may be seen that this provision contained in section 2 of the Fatal Accidents Act itself is procedural in character as it does not create any substantive right in the executor, administrator or representative of the deceased to claim pecuniary loss to the estate of the deceased. The substantive right is always in the general law of torts. But as the law originally stood, such right to claim pecuniary loss to the estate would have died with the deceased and no action could be maintained by the deceased's executor, administrator or representative. The Legal Representatives' Suits Act altered the position and made the cause of action for such pecuniary loss to the estate of the deceased to survive to the executor, administrator or representative of the deceased. Section 2 of the Fatal Accidents Act only says that the executor, administrator or representative of the deceased may insert a claim for pecuniary loss to the estate of the deceased in a suit or action brought on behalf of the dependants of the deceased for loss of benefit as contemplated under section 1-A. Thus it is clear that section 2 of the Fatal Accidents Act itself does not create any right, but it is only an enabling provision saying that if there is an action or suit for loss of benefit to the dependants the executor, administrator or representative of the deceased may insert a claim for pecuniary loss to the estate of the deceased in the same action.

20. Section 306 of the Indian Succession Act (and the corresponding provisions in the earlier Acts, *viz.*, Probate and Administration Act of 1881 and the Indian Succession Act of 1865) says that cause of action for personal injuries does not survive to and against the executors or administrators of a deceased person. But the exception is in respect of personal injuries causing the death of the party. In case of personal injuries causing the death of the party, the cause of action does survive to the executors or administrators of the deceased. This is in accordance with the Legal Representatives' Suits Act of 1855. But for that Act, under the maxim *actio personalis moritur cum persona*, the cause of action even in respect of injuries causing the death of the person would die with him.

21. There is no distinction between a motor accident causing fatal injuries to a person and other accidents or any other act causing such fatal injuries regarding rights and liabilities of the parties. The liability of the defendant in all such cases, including cases of motor accidents, is founded only on the law of torts. As the motor vehicles increased and motor accidents were also on the increase, the Legislature compelled the owners of motor vehicles to have insurance cover in respect of third party risks. Under section 110 of the Motor Vehicles Act, 1939 as it stood before the amendment of the year 1956, the State Governments had been empowered to appoint persons to investigate and report on motor accidents. But such persons so appointed were not empowered to adjudicate on the liability of the insurer or on the amount of damages to be awarded, except at the express desire of the insurance company concerned. Therefore, till the amendment of the Act in the year 1956, the claimants in respect of injury or death due to a motor accident had to go only to the civil Court just like in any other case of tort.

22. Then in the year 1956, the Legislature substituted the present section 110 for the former section and also introduced sections 110 A-to 110-F. The present provisions contained in sections 110 to 110-F came into effect on 16 February, 1957. The statement of objects and reasons for substituting the present sections 110 to 110-F in the place of the original section 110 is significant. It is stated that the original provision had not helped persons of limited means in preferring claims on account of injury or death because a Court decree has to be obtained before the obligation of an insurance company to meet the claims can be enforced and

it is therefore proposed to empower State Governments to appoint Motor Accidents Claims Tribunals to determine and award damages. Thus it is clear that in respect of claims relating to motor accidents, which were being entertained by the civil Courts, the Legislature paved the way for the creation of a new forum in the shape of Motor Accidents Claims Tribunal. There can be no doubt, therefore, that the provisions contained in sections 110 to 110-F of the Motor Vehicles Act, which speak of the constitution of Motor Accidents Claims Tribunals and how applications to such Tribunals should be made and disposed of, relate only to procedure and they have nothing to do with the substantive rights and liabilities of parties. It is needless to stress that the substantive right of a claimant and the liability of the defendant have to be determined only as per the law of torts and that but for the Legal Representatives' Suits Act and the Fatal Accidents Act (both of the year 1855), there would be no cause of action available to any one in respect of injuries resulting in the death of the injured.

23. Till the recent amendment of the Act by Act (LVI of 1969), section 110 stated that the Accidents Claims Tribunal is to be constituted for the purpse of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles. It did not say anything about personal properties lost by the injured or the person who died in such motor accident. Under substantive law, if a person is injured owing to the defendant's tortious act, he would, among other things, be entitled to the value of damages, if any, to his personal property. If a person goes on a cycle and he is knocked down by a motor car due to the negligence or rashness on the part of the motor car driver, then the person who is so knocked down would be entitled to claim the value of the damaged cycle, apart from other damages. Even if the injured dies as a result of the injuries, his legal representatives can maintain a claim in respect of the value of damages to the cycle as part of loss to the estate of the deceased. Section 110 of the Act, as it stood before the recent amendment of 1969, did not specifically provide for the Motor Accidents Claims Tribunal going into the question of such damages to property. In *Selvaraj* v. *Jagannathan*[1], the question arose whether the civil Court has no jurisdiction to entertain even a claim in respect of damage to property in a motor accident. That is a case where a person was injured and his cycle was damaged by a motor accident. He filed a suit in the civil Court for damages towards his personal injuries as well as damages to the cycle. As a Motor Accidents Claims Tribunal had been constituted, the civil Court returned the plaint holding that it had no jurisdiction to entertain any part of the claim. On a revision against such an order, Veeraswami, J. (as he then was), held that in so far as the claim in respect of personal injuries is concerned, sections 110 (1) and 110-F of the Motor Vehicles Act make it clear that the claim for bodily injury is triable only by the Claims Tribunal having territorial jurisdiction, but the jurisdiction of such Tribunal is limited by the terms of the statute and did not cover claims of damages to property and that therefore the civil Court had jurisdiction to try the suit in so far as that relates to the claim of compensation for demage to the property. The learned Judge was aware of the difficulty in two forums entertaining claims in respect of one and the same accident—one forum regarding personal injuries and the other regarding damages to property—for there is likely to be conflict of findings. But the learned Judge said that such difficulty would not make any difference to the limits of the jurisdiction of the statutory Tribunal set by the terms of the legislation. To rectify the above unsatisfactory position the Legislature has now amended section 110 (1) of the Act by the Amending Act (LVI of 1969). In my opinion, this recent amendment makes it abundantly clear that sections 110 to 110-F of the Act are only procedural in character and they do not deal with substantive law. Section 110 (1) before the recent amendment, read as follows:—

"A State Government may, by notification in the Official Gazette,

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1. (1968) 81 L.W. 386.

constitute one or more Motor Accidents Claims Tribunals (hereinafter referred to as Claims Tribunals) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles".

The words "motor vehicles" occurring in the above sub-section have now been substituted with other words and a proviso has also been added and section 110 (1), as amended, reads as follows:—

> "A State Government may, by notification in the Official Gazette, contitute one or more Motor Accidents Claims Tribunals (hereinafter referred to as Claims Tribunals) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damage to any property of a third party so arising, or both:
>
> Provided that where such claim includes a claim for compensation in respect of damage to property exceeding rupees two thousand, the claimant may, at his option, refer the claim to a civil Court for adjudication, and where a reference is so made, the Claims Tribunal shall have no jurisdiction to enertain any question relating to such claim".

It is clear that after the amendment, in respect of a motor accident which involves not only the death of, or bodily injury to, a person but also damage to property—such damage being more than Rs. 2,000—the civil Court and the Motor Accidents Claims Tribunal would have concurrent jurisdiction, as it were, and the claimant in such a case would have the option to choose the forum. The provision also makes it clear that if, in such a case, the claimant chooses the civil Court, the jurisdiction of the Claims Tribunal would be completely ousted. It must be noted that in such a case the entire claim, *viz.*, the claim for personal injuries or death, as the case may be, and damages to property can be entertained by the civil Court and once the claimant chooses the civil Court for making his claim, the jurisdiction of the Claims Tribunal would be ousted. Therefore there can be no doubt that sections 110 to 110-F prescribe only a special forum in the place of the civil Court in respect of claims relating to motor accidents and those sections have nothing to do with the substantive rights and liabilities of parties.

24. Before dealing with the case law on the point, I would like to dispose of another aspect. The State Government has framed the Madras Motor Accidents Claims Tribunals Rules, 1961. Under rule 2 (*c*) of the said rules, the terms "legal representative" occurring in section 110-A is stated to have the same meaning assigned to it under section 2 (11) of the Code of Civil Procedure. I am of the opinion that the term "legal representative" occurring in section 110-A of the Act has wider import than the definition of the terms contained in section 2 (11) of the Code of Civil Procedure and that particular rule made by the State Government is beyond its rule-making power and therefore it should be struck down. The said rules are purported to be made under section 110 (1) of the Act. But section 110 (1) does not really give power to the State Government to make any rules. That only speaks of the power of the State Government to constitute Motor Accidents Claims Tribunals. It is section 111-A that gives power to the State Government to make rules "for the purpose of carrying into effect the provisions of sections 110 to 110-E". I take it that the Motor Accidents Claims Tribunals Rules, 1961 are made under the above provision, *viz.*, under section 111-A. Rule 2 (*c*) of the said rules says:

> "'Legal representative' shall have the meaning assigned to it under clause (11) of section 21 of the Code of Civil Procedure, 1908".

'Section 21' occurring in the above rule is an obvious mistake for 'section 2'.

25. No doubt the definition of the term "Legal representative" under section 2 (11) of the Code of Civil Procedure is wide. It takes in not only administrators, executors and heirs but all other persons who represent the estate

of the deceased. The definition says that the terms include even persons who intermeddle with the estate of the deceased Even so, this definition would not take in all the persons who would be entitled to file claim as per the provisions contained in the Fatal Accidents Act and the Legal Representatives Suits Act. Under the Legal Representatives' Suits Act, an action can be maintained by an executor, administrator or representative of the deceased person in respect of pecuniary loss to the estate. Under the Fatal Accidents Act, a claim for loss of benefit to the dependants mentioned under section 1-A shall be brought in the name of the executor, administrator or representative of the deceased person. Therefore both the claims, *viz.*, the claim for loss of benefit as well as that for loss of the estate, can be brought not only by an executor or administrator but also by a representative of the deceased As already pointed out, if there is a claim for loss of benefit to the dependants mentioned in section 1-A of the Fatal Accidents Atc, a claim for loss to the estate (the cause of action for which claim is preserved by the Legal Representatives' Suits Act) can be inserted in the same claim.

26. The term "representative" occurring in section 1-A of the Fatal Accidents Act, in my opinion, has a different connotation than the definition of the term "legal representative" contained in section 2 (11) of the Code of Civil Procedure. I am also of the opinion that the term "legal representative" occurring in section 110-A of the Act takes in persons covered by the term "representative" occurring in section 1-A of the Fatal Accidents Act. Section 2 (11) of the Code of Civil Procedure, though wide to cover not only administrators, executors and heirs but also other persons, it would certainly not take in persons who do not represent the estate of the deceased. But in my opinion, the term "representative" occurring in section 1 A of the Fatal Accidents Act has different connotations and the term takes in even persons who do not represent the estate of the deceased.

27. In *Shwe Mya* v. *Maung Ho Hnaung*[1], the Privy Council had observed that the word "representative" is a term of ambiguous meaning and must be construed according to its context. In Stroud's Judicial Dictionary, it is stated that the meaning of the term "representatives", "legal representatives", "personal representatives" or "legal personal representatives" may be controlled by the context. It is pointed out that in certain contexts such terms would mean next-of-kin and not executors or administrators. In Ramanatha Aiyar's Law Lexicon it is stated that the ordinary legal sense of the term "representatives" without the addition of "legal" or "personal", is executors and administrators, but contextually "representatives" may be taken to mean as "next-of-kin" or the "descendants". It is said in the same book that the term "legal representative" ordinarily means the executor or administrator, though sometimes, when required by the context and surrounding circumstances, it is held to mean next-of-kin and, under rare and peculiar facts, may mean heirs, who themselves, in a broad sense, are often regarded as the legal representatives of the decedent. Therefore it is clear that the term "representative" or "legal representative" should ordinarily denote a person who represents the estate of the deceased, but the said terms may denote even next-of-kin if the context warrants it. We are of the opinion that the term "representative" occurring in section 1-A of the Fatal Accidents Act means next-of-kin and not merely heirs or persons who represent the estate of the deceased.

28. It should be remembered that the claim under section 1-A of the Fatal Accidents Act is for the benefit of certain persons who are termed as dependants of the deceased. Section 1-A says that the wife, husband, parent and child are such dependants and section 4 of the said Act interprets the term "parent" as to include not only father and mother but also grandfather and grandmother and that the word "child" shall include not only son and daughter but also grandson and grand-daughter and step-son and step-daughter. The claim made on behalf of them need not be as representative of the estate of the deceased. A representative of the estate of the deceased can claim on behalf

1. (1923) 44 M.L.J. 732 at 734 : 49 I.A. 395 : A.I.R. 1922 P.C. 359.

of the estate only such right which the deceased could have claimed in his own lifetime. A claim towards loss of benefit to the dependants mentioned in section 1-A of the Fatal Accidents Act is certainly not a claim which the deceased could have possibly made during his lifetime. As I said earlier, the right to claim loss of benefit on behalf of the dependants mentioned in section 1-A is a new right created by the statute. It is in this context we have to understand the word "representative" occurring in section 1-A of the Fatal Accidents Act.

29. If the term "representative" in the above section is not to be understood as next-of-kin, then some of the dependants mentioned in that section may not be entitled to make a claim in their own name. The father of the deceased, as well as the grandfather of the deceased, is a dependant entitled to claim compensation for loss of benefit, though, of course, there must be proof that but for the death of the deceased he would have been receiving some benefit from him and the quantum of compensation has to be determined in favour of each dependant separately according to the nature and extent of dependency. But such father or grandfather may not be an heir if the deceased has left a widow or mother or child and the parties are Hindus and he may not also be a person representing the estate of the deceased as contemplated under section 2 (11) of the Code of Civil Procedure. Though it is clear that for a person to be one representing the estate of the deceased, he need not necessarily be an administrator, executor or heir, still he must have something to do with the estate of the deceased. Therefore if the father or grandfather, who is not an heir, has no possession of any part of the estate of the deceased and he has nothing to do with such estate, he may not be a person representing the estate of the deceased in any sense of the term. That means if the term "representative" occurring in section 1-A of the Fatal Accidents Act is understood as a person representing the estate of the deceased, a father or grandfather of the deceased may not be in a position to bring an action in his own name for loss of benefit. Under the above circumstances, I am of the opinion that the term "representative" occurring in section 1-A of the Fatal Accidents Act should be understood as referring to next-of-kin who are the dependants of the deceased as contemplated under that Act.

30. The term "representative" occurring in the Legal Representatives' Suits Act need not have the same meaning because of the context. Under that Act, the cause of action for a claim of loss to the estate of the deceased is made to survive the death of the person. Therefore a claim under the Legal Representatives' Suits Act can be only the loss to the estate of the deceased. That being so, the term "representative" occurring in that Act should refer to persons who represent the estate of the deceased and that need not take in next-of-kin who would be dependants of the deceased under the Fatal Accidents Act but may not be persons who represent the estate of the deceased. I have already pointed out that the word "representative" has to be understood according to context. Therefore the word "representative" occurring in section 1-A and the same term occurring in the Legal Representatives' Suits Act need not have the same meaning. In fact, the term "representative" occurring in section 2 of the Fatal Accidents Act has to be understood only in the same way as in the Legal Representatives' Suits Act, (*i.e.,*) as a person representing the estate of the deceased, for that section speaks of claim relating to the pecuniary loss to the estate of the deceased. The above conclusion of mine would mean that the term "representative" occurring in different sections of the Fatal Accidents Act would have different meanings. While under section 1-A the term "representative" should refer to next-of-kin who are dependants, in section 2 the same term has to refer to persons representing the estate of the deceased. But when the term has to be understood according to context, we do not see any difficulty in placing such construction on the term which differs from one section to another.

31. Sections 110 to 110-F of the Act being only procedural in character and having nothing to do with the substantive rights and liabilities of parties, do not make any reference to either loss of benefit or loss to the estate as heads on which

compensation can be claimed in the case of a person whose death was caused by a motor accident. The said sections do not also mention anything about the circumstances under which the owner of the motor vehicle concerned would be liable to pay compensation. As I pointed out, even though the said sections merely speak of payment of compensation, undoubtedly a claimant cannot succeed unless he proves a tortious act on the part of the owner of the vehicle, either by himself or vicariously. A claim for compensation even in respect of a motor accident is certainly governed by the law of torts and only by virtue of the Legal Representatives' Suits Act and the Fatal Accidents Act claims for compensation in respect of the death of a person in such an accident could be made. Only compensation for loss to the estate of the deceased (the cause of action for which is preserved by the Legal Representatives' Suits Act) and loss of benefit to the dependants (which right has been created by section 1-A of the Fatal Accidents Act) can be claimed in case of death of a person in any accident, including a motor accident. In respect of any other accident amounting to a tortious act, the claim has to be necessarily made in the ordinary civil Court. But in respect of a motor accident similarly amounting to a tortious act, the claim has to be made before the Motor Accidents Claims Tribunal, except under certain circumstances. It was already noted that under the amended provisions of section 110 (1), under certain circumstances, the claimant can choose the forum and if he opts to make the claim before the ordinary civil Court, the jurisdiction of the Motor Accidents Claims Tribunal would be completely ousted in such a case.

32. It is in the above context, one has to see the sense in which the term "legal representative" is used in section 110-A of the Act. As I said, the relevant sections in the Act do not speak of either loss of benefit to the dependants or loss to the estate, though undoubtedly in case of death, only under those two main heads compensation can be claimed. Under section 110-A of the Act, in the case of death of a person, compensation could be claimable not only for the loss to the estate but also loss of benefit to the dependants as contemplated under section 1-A of the Fatal Accidents Act. The term "legal representative", therefore, should necessarily include not only persons who represent the estate of the deceased (who can claim loss to the estate of the deceased) and the next-of-kin who are mentioned as dependants under section 1-A of the Fatal Accidents Act who can claim compensation for loss of benefit to themselves, whether they represent the estate of the deceased or not. In other words it should take in all persons who can maintain an action under the Legal Representatives' Suits Act (or under section 2 of the Fatal Accidents Act, as the case may be) as well as those who can maintain an action under section 1-A of the Fatal Accidents Act. That being so, one cannot restrict the meaning of the term "legal representative" occurring in section 110-A of the Act as that in section 2 (11) of the Code of Civil Procedure.

33. It is true that the Supreme Court has pointed out in *Andhra Bank Ltd.* v. *Srinivasan*[1], that the term "legal representative" as defined in the Code of Civil Procedure is not limited to administrators, executors and heirs but includes any person who, in law, represents the estate of the deceased. In so saying their Lordships of the Supreme Court have quoted with approval the observations of Woodroffe J. in *Dinamoni Chaudhurani* v. *Elahadut Khan*[2], in dealing with the connotation of the term "legal representative" occurring in section 234 of the Code of Civil Procedure, 1882. The Supreme Court further points out that because of the above observations of Woodroffe, J. in the said case, in the subsequent Code of Civil Procedure, *viz.*, the present Code, section 2 (11) defining the term "legal representative" has widened the scope of the said term. The Supreme Court points out that as per section 2 (11) of the present Code of Civil Procedure, "a person who in law represents the estate of a deceased person" must include different legatees under the will and that there is no justification for holding that the "estate" in the context must mean the whole of the estate. It is also pointed

1. (1963) 1 M.L.J. (S.C.) 14 : (1963) 1 An. W.R. (S.C.) 14 : (1962) 2 S.C.J. 676 : (1962) 3 S.C.R. 391 : A.I.R. 1962 S.C. 232.
2. (1904) 8 Cal.W.N. 843.

out that a person who is in possession of a part of th estate of the deceased would be an intermeddler with the estate, coming within the scope of section 2 (11) of the Code. Even so, as I already pointed out, a legal representative as contemplated under section 2 (11) of the Code of the Civil Procedure should necessarily represent the estate of the deceased A person who is a dependant under section 1-A of the Fatal Accidents Act need not necessarily be one who represents the estate of the deceased. Therefore the term "legal representative.' occurring under section 110-A of the Act cannot be equated with the term in section 2 (11) of the Code of Civil Procedure. I am clearly of the opinion that the said term occurring in section 110-A has a wider connotation than that in the Code of Civil Procedure.

34. Rule 2 (*c*) of the Madras Motor Accidents Claims Tribunals Rules, 1961 is certainly beyond the rule-making power of the State Government. First of all, section 111-A of the Act gives power to the State Government to make rules only for the purpose of carrying into effect the provisions of sections 110 to 110-F. Under the guise of this power, the State Government cannot possibly make a rule as to who are entitled to file an application which would touch upon the substantive rights of parties. The attempted definition under rule 2 (*c*) is not necessary for the purpose of carrying into effect the provisions of sections 110 to 110-B of the Act.

35. Further as I already pointed out, if the term "legal representative" occurring in section 110-A is to have the same meaning as in section 2 (11) of the Code of Civil Procedure, then the rights of some of the dependants under section 1-A of the Fatal Accidents Act who may not be persons representing the estate of the deceased, would be affected and they would be out of Court. Surely sections 110 to 110-F of the Act are not meant to affect the rights of parties under substantive law which is in force. Under all these circumstances, I hold that rule 2 (*c*) mentioned above is beyond the rule-making power of the State Government.

36. The State of Mysore had made a similar rule as rule 2 (*c*) of the Madras Motor Accidents Claims Tribunals Rules, 1961. A Division Bench of the Mysore High Court held that that was beyond the powers of the State Government and *ultra vires* the Act, in *M. Ayyappan* v. *Moktar Singh*[1]. In a later case, *M. Basavalingiah* v. *T. P. Papanna*[2], another Bench of the same High Court seems to hold that the decision of the earlier Bench is not correct and that the definition of the term "legal representative" occurring in section 2 (11) of the Code of Civil Procedure (which definition is applied to the term in section 110-A of the Act by the rule made by the State Government) would take in all the dependants mentioned under section 1-A of the Fatal Accidents Act. That was a case where the question was whether the father of the deceased can maintain an action for compensation regarding the death of his son when the mother of the deceased is alive. Under Hindu Law, the father is not an heir of the son when the mother is alive. The contention was that the father was not a legal representative as contemplated under section 110-A of the Act and therefore his claim should be negatived. This contention, if I may say so with respect, was rightly rejected by the Bench of the Mysore High Court. But in doing so, they seem to hold that all the dependants mentioned under section 1-A of the Fatal Accidents Act would come under the definition of section 2 (11) of the Code of Civil Procedure. With respect, I am unable to agree with that view. As I already pointed out, under section 2 (11) of the Code of Civil Procedure, unless a person represents the estate of the deceased, he cannot be called a legal representative and some of the dependants under section 1-A of the Fatal Accidents Act need not necessarily be persons who represent the estate of the deceased. In the case before the Mysore High Court, the father was certainly entitled to maintain the claim not because he would necessarily be a legal representative as contemplated under section 2 (11) of the Code of Civil Procedure but because he is a legal representative under section 110-A of the Act which

1. (1969) 2 Mys.L.J. 264: (1969) A.C.J. 439: A.I.R. 1970 Mys. 67.
2. (1971) 2 Mys.L.J. 351 : (1971) A.C.J. 404.

is wider in scope than section 2 (11) of the Code of Civil Procedure. I am of the opinion that the decision of the earlier Bench of the Mysore High Court in *M. Ayyappan* v. *Moktar Singh*[1], holding that the rule made by the State Government equating the term "legal representative" occurring in section 110-A of the Act with section 2 (11) of the Code of Civil Procedure is beyond the rule-making power of the State Government and *ultra vires* the Act, is the correct view. In *Kasturi Lal* v. *Prabhakar*[2], a Division Bench of the Madhya Pradesh High Court held at page 8.

> "The term 'legal representative' must be construed in the context of the provisions of section 2 (11), Civil Procedure Code, and further also in the context of the provisions of the *Fatal Accidents Act*".

With respect, I agree with the above observation.

37. One of the contentions raised on behalf of the appellants is that as section 110-B of the Act speaks of the Tribunal making "an award determining the amount of compensation which appears to it to be just", the powers of the Tribunal are independent of the provisions of the Fatal Accidents Act (as well as that under the Legal Representatives' Suits Act) and that therefore the provisions of the Act must be construed as substantive provisions and not merely procedural in character. This contention is fallacious. It is true that the Tribunal has to determine "the amount of compensation which appears to it to be just". But the question is, compensation for what. If it is a claim by an injured person, he can certainly claim compensation for the pain, suffering, etc. loss of earning, other pecuniary loss arising out of the injury and shortening of expectation of life, if any, provided the injury or injuries had been caused by a tortious act by the owner of the vehicle, by himself or vicariously. So, even though the Claims Tribunal is given power to determine the amount of compensation which appears to be just, it has necessarily to look to the law of torts in determining such 'just' compensation. Similarly, in case of death due to injuries, 'just' compensation awardable by the Tribunal should naturally be only towards loss of benefit, if any, and loss of estate, if any, provided again that the death was caused by a tortious act. Therefore by the mere use of the words "compensation which appears to it to be just" in section 110-B, the relevant provisions of the Act (Sections 110 to 110-F of the Act) cannot be said to create new rights or liabilities. It can never be contended that these provisions in the Act are in any way meant to alter or amend the pre-existing law relating to substantive rights and liabilities of the parties.

38. I think I have said enough to show that sections 110 to 110-F of the Act are only procedural in character and for substantive rights and liabilities of the parties one has necessarily to look to the law of torts read with the Legal Representatives' Suits Act and the Fatal Accidents Act. The recent amendment of section 110 (1) of the Act itself puts the position beyond the pale of controversy. In the recent amendment (*i.e.*,) under amending Act LVI of 1969, some new sections have been added, one of which (section 110-CC) gives power to the Claim Tribunal to award simple interest on the amount awarded from the date of the claim application. It cannot be said that that creates any new right and thereby the provisions in the Act become substantive law and not merely procedural in character, for even the civil Court is not incompetent to award such interest.

39. Now I turn to the case law on the point whether sections 110 to 110-F are only procedural in character or not. In *Palani Ammal* v. *The Safe Service Ltd.*[1], a Division Bench of this Court had to deal with the question as to which is the proper forum in respect of an accident which occurred prior to the constitution of the Claims Tribunal. The Division Bench observed at page 21:

> "As we pointed out, section 110 provides a speedier remedy, obviously conceived as a better one from the

1. (1969) 2 Mys.L.J. 264 : (1969) A.C.J. 439: A.I.R. 1970 Mys. 67.
2. (1970) A.C.J. 1.

1. (1966) A.C.J. 19.

point of view of the injured person or his unfortunate dependants. No new right or even a new remedy has been created by that provisions; the forum alone is changed. The right to claim damages by the legal representatives of a deceased in respect of an accident, where the latter met with his death, was actionable under the pre-existing law, in civil Court. The effect of the new provision is to create a new forum, thus, taking away the jurisdiction of the ordinary civil Court. The aggrieved person has, as before, a remedy for damages in respect of the injury. The forum alone is changed. The period of limitation has also been curtailed, but these two are matters of procedure".

Then at page 22, the Division Bench held that as the above provisions in the Act relate only to procedure, the law prevailing at the time of the institution of the action alone will govern such matters. The conclusion was that even in respect of accidents which occurred prior to the constitution of the Tribunal, only the Tribunal will have exclusive jurisdiction and the jurisdiction of the civil Court is ousted. With respect, I agree with the view expressed by the above Bench.

40. In *Kasturi Lal* v. *Prabhakar*[1], (which was referred to earlier in some other connection), the Madhya Pradesh High Court has followed the above decision of this Court and held that sections 110 to 110-F of the Act only provide a more expeditious remedy and that they do not create any new rights. In *Kamla Devi* v. *Kishan Chand*[2], as well as *Mangilal* v. *Parasram*[3], the Madhya Pradesh High Court has taken the same view. The last decision mentioned is by a Full Bench of the Madhya Pradesh High Court. In *Shri Ram Pertap* v. *Punjab Roadways, Ambala*[4], a similar view has been taken and it has been held that sections 110 to 110-F merely deal with the subject of the substitution of Motor Accidents Claims Tribunal in place of civil Courts for the purpose of adjudicating on claims for compensation and they do not deal with the question of substantive rights and

1. (1970) A.C.J. 1.
2. (1970) A.C.J. 310 : A.I.R. 1970 M. P. 168.
3. A.I.R. 1971 M. P. 5 at 9.
4. A.I.R. 1962 Punj. 540.

liabilities of parties. The Mysore High Court has taken a similar view in *Ariyamma* v. *Narasimha*[1]. The Orissa High Court has also taken a similar view in two cases *viz.*, *Orissa Co-operative Insurance Society Limited* v. *Bhagaban Sahu*[2], and *The Oriental Fire and General Insurance Company Limited* v. *Kamal Kamini Das*[3]. In *Amarjit Kaur* v. *Vanguard Insurance Company Limited*[4], the Delhi High Court has also taken a similar view. *P.B. Kader* v. *Thatchamma*[5], is also of the same view.

41. However, there is another line of cases starting from a Bench decision of this Court taking a different view. *Mohammed Habibullah* v. *Seethammal*[6], is a decision of a Division Bench of this Court dismissing a Letters Patent Appeal *in limine*. That is a case where the sister of a person who died in a motor accident claimed compensation. The claim was upheld by Venkatadri, J., Over that, the owner of the vehicle and the insurer thereof filed the Letters Patent Appeal. Ananthanarayanan, C.J., and Ramakrishnan, J., refused to admit the Letters Patent Appeal and dismissed it. While doing so, they have made certain observations which are not in consonance with the view expressed in *Palani Ammal* v. *The Safe Service Limited*[7], (a decision by a Division Bench of this Court consisting of Ramachandra Iyer, C.J., and Venkatadri, J.) and other cases. The sister of a deceased person is no doubt not a dependant as contemplated under section 1-A of the Fatal Accidents Act, but still, if she represented the estate of the deceased, she could certainly maintain an action for claim on the ground of loss to the estate of the deceased. Therefore there is nothing wrong in awarding compensation to her towards the death of her brother. The learned Judges concluded at page 350.

> "The only point was whether the claim could be advanced by the married sister of the deceased who died as bachelor. It can certainly be so advanced, since section 110-A definitely provides for

1. (1972) A.C.J. 22.
2. (1971) A.C.J. 49.
3. (1972) A.C.J. 92.
4. (1969) A.C.J. 286.
5. A.I.R. 1970 Ker. 241.
6. (1966) A.C.J. 349.
7. (1966) A.C.J. 19.

the foundation of a claim by any legal representative of the victim of the accident."

This conclusion does not go counter to the view expressed by us and in *Palani Ammal* v. *The Safe Service Limited*[1], as well as other cases already referred to. But the learned Judges (Anantanarayanan, C.J., and Ramakrishnan, J.,) in the course of their order dismissing the Letters Patent Appeal *in limine*, have observed that sections 110 to 110-F have no connection whatsoever with the Indian Fatal Accidents Act and that they constitute a self-contained code for the adjudication of claims to compensation on behalf of the victims of a motor accident and the Legislature provided a complete machinery for the adjudication of such claims. The learned Judges, however, did not specifically go into the question whether sections 110 to 110-F of the Act are only procedural in character or whether they lay down substantive law.

42. The decision of the earlier Bench (*i.e.*) in *Palani Ammal* v. *The Safe Service Limited*[1], does not seem to have been brought to the notice of the learned Judges who decided in *Mohammed Habibullah* v. *Seethammal*[2]. It is against the judgment of Venkatadri, J., the Letters Patent Appeal had been filed before Anantanarayanan, C.J., and Ramakrishnan, J., Venkatadri, J., is a party to the decision in *Palani Ammal* v. *The Safe Service Limited*[1], which specifically holds that sections 110 to 110-F of the Act are only procedural in character and they do not create any new rights or liabilities. Therefore Venkatadri, J., in the judgment which was challenged in the Letters Patent Appeal before Anantanarayanan, C.J. and Ramakrishnan, J., could not have expressed a different view. As I said, even Anantanarayanan, C.J. and Ramakrishnan, J., have not specifically dealt with the question whether the abovesaid sections of the Act are only procedural in character or they constitute substantive law. Anyway, the decision of Anantanarayanan, C.J. and Ramakrishnan, J, cannot be treated as a precedent in view of the fact that the judgment was not rendered after full arguments and it was only a dismissal of the Letters Patent Appeal even at the admission stage. The Nagpur High Court had held in *Kanglu Baula* v. *Chief Executive Officer*[1], that an argument addressed at motion hearing is rarely full and that a decision given at such a hearing must be held to be one given by the learned Judge *per incuriam* and that such a decision by a Court *per incuriam* is not binding as a precedent. In *Rex* v. *Charles Leslie Norman*[2], and *Nicholas* v. *Penny*[3], it has been held that decisions rendered without hearing both the sides are not entitled to great weight. These decisions have been followed by one of us in *Abdul Malik* v. *Collector of Dharmapuri*[4]. Therefore the decision by Anantanarayanan, C.J., and Ramakrishnan, J. is not a precedent, apart form the fact that the point in question has not been specifically dealt with in that judgment.

43. In *Veena Kumari Kohli* v. *Punjab Roadways*[5], a single Judge of the High Court of Punjab and Haryana observed that in fixing the quantum of compensation in respect of a motor accident, the principles enunciated by the Supreme Court in *Gobald Motor Service Limited* v. *R.M. K. Veluswami*[6], do not apply on the ground that the claim is not made under the Fatal Accidents Act but only under the provisions of the Motor Vehicles Act. This decision seems to suggest that sections 110 to 110-F of the Act are not merely procedural in character. The earlier decision of the same High Court, (*i.e.*) *Ram Pratap* v. *Punjab Roadways*[7], taking the view as I do in this case, has not been considered by the Judge who decided in *Veena Kumari Kohli* v. *Punjab Rowadways*[5] *Ishwari Devi* v. *Union of India*[8], *W.S. Bahg Singh and Sons* v *Om Parkash Kaith*[9], and *Ramji Das* v. *Shom Singh*[10], are all judgments of the Delhi High Court expressing the contrary view. The first of these

1. (1966) A.C.J. 19.
2. (1966) A.C.J. 349.

1. A.I.R. 1955 Nag. 49 at 64.
2. L.R. (1924) 2 K.B. 315.
3. L.R. (1950) 2 K.B. 466.
4. (1968) 1 M.L.J. 9.
5. (1967) A.C.J. 297.
6. (1962) 1 An.W.R. (S.C.) 105 : (1962) 1 M.L.J. (S.C.) 105 : (1962) 1 S.C.J. 2c6 : (1962) M.L.J. (Crl.) 120 : (1962) 1 A.C.R. 929 ; A.I.R. 1962 S.C. 1.
7. A.I.R. 1962 Punj. 540.
8. (1968) A.C.J. 141.
9. (1971) A.C.J. 324.
10. (1971) A.C.J. 468.

three cases has followed the judgment of Anantanarayanan, C.J. and Ramakrishnan, J., (*Mohammed Habibullah* v. *Seethammal*[1]. In *Domyanti Devi and others* v. *Sita Devi*[2], the Punjab and Haryana High Court has followed the judgment of Anantanarayanan, C.J. and Ramakrishnan, J., in *Mohammed Habibullah* v. *Seethammal*[1], as well as the decision of the Delhi High Court in *Ishwari Devi* v. *Union of India*[3]. In these decisions, the view expressed by Ramachandra Iyer, C.J. and Venkatadri, J., in *Palani Ammal* v. *The Safe Service Limited*[4], and the other cases which take a similar view, have not been considered. For the reasons discussed earlier I am unable to follow the view contained in the above decisions.

44. In *M.A. Rahim* v. *Sayari Bai*[5], a Division Bench of this Court referred to the decision of Anantanarayanan, C.J. and Ramakrishnan, J., in *Mohammed Habibullah* v. *Seethammal*[1], with approval. The decision of the earlier Bench of this Court *viz.*, that of Ramachandra Iyer, C.J. and Venkatadri, J., in *Palani Ammal* v. *The Safe Service Limited*[4], does not seem to have been brought to the notice of the learned Judges. The amendment to section 110 (1) of the Act made by Act LVI of 1969 which, as I said earlier, strengthens the view that sections 110 to 110-F of the Act are only procedural in character and have nothing to do with the substantive rights and liabilities of parties, also does not seem to have been brought to the notice of the learned Judges.

45. That apart, this Division Bench though has stated that sections 110 to 110-F of the Act are self-contained and exhaustive, has not held that they create new rights or liabilities. The claimant in the case before the Division Bench is the mother of the victim who would be entitled to claim loss of benefit under section 1-A of the Fatal Accidents Act as well as loss to the estate of the deceased as a person representing his estate. Therefore the only question before the Division Bench was regarding the principles which are to be applied in determining the quantum. The learned Judges said in respect of the determination of the quantum that the decisions rendered under the general law of tort and under the Fatal Accidents Act will undoubtedly be relevant and constitute broad guidelines, but they would not be binding on the Tribunal in the sense that the method of approach should be the same and identical as in the cases arising under the Fatal Accidents Act. I am of the view that the latter part of the above observations of the learned Judges who decided *M.A. Rahim* v. *Sayari Bai*[1], would not have been made if the decision of the earlier Bench in *Palani Ammal* v. *The Safe Service Limited*[2], and the amendment to section 110 (1) of the Act made by the amending Act LVI of 1969 had been brought to their notice.

46. The only other decision which has to be referred to in this connection is *Chinnaponnu Ammal* v. *T.N. Mooka Pillai*[3], which is one by a single Judge of this Court. That was a case where the sister of a person who died in a motor accident claimed compensation.

47. The Motor Accidents Claims Tribunal dismissed the claim on the ground that the sister is not a dependant as contemplated under section 1-A of the Fatal Accidents Act. The appeal filed by the sister was allowed. The sister, as a person representing the estate of her deceased brother, would certainly be entitled to claim compensation for loss to the estate of the deceased. But surely she would not be entitled to claim loss of benefit to herself because she is not a dependant under section 1-A of the Fatal Accidents Act. In allowing the appeal, the learned Judge has observed that the Motor Vehicles Act, 1939, is a special enactment and that it excludes the general enactment, *viz.*, the Fatal Accidents Act, 1855. This observation cannot be held to be good law. If the claim is towards loss of benefit, it should necessarily be under the Fatal Accidents Act and without invoking the provisions therein there is no scope for awarding compensation for loss of benefit

1. (1966) A.C.J. 349.
2. (1972) A.C.J. 334.
3. (1968) A.C.J. 141.
4. (1966) A.C.J. 19.
1. (1972) 2 M.L.J. 347 : (1972) A.C.J. 470 : A.I.R. 1973 Mad. 83.

1. (1972) 2 M.L.J. 347 : (1972) A.C.J. 470 : A.I.R. 1973 Mad. 83.
2. (1966) A.C.J. 19.
3. (1968) A.C.J. 24.

48. The resulting position form the above discussion is that in respect of applications under section 110-A of the Act for the death of a person in a motor accident, the claimants must prove that the accident amounted to a tortious act and if that is proved, compensation can be awarded for loss of benefit to the claimants if they are dependents as contemplated under the provisions of the Fatal Accidents Act and compensation can also be awarded towards loss to the estate of the deceased, whether the claimants are dependants under the Fatal Accidents Act or not.

49. It is unnecessary to deal with the principles that would govern the assessment of the quantum of compensation towards loss of benefit in this case because the claimants (appellants before us) are not dependants of the deceased as contemplated under sections 1-A and 4 of the Fatal Accidents Act. However, I may mention that it is settled law that while fixing the quantum of compensation towards loss of benefit, any pecuniary advantage received by the claimants upon the death of the deceased should also be taken into consideration and compensation awarded towards loss to the estate of the deceased would also be such pecuniary advantage which should be taken into consideration in assessing the quantum towards loss of benefit. If there is pecuniary advantage to the claimants, that should go in reduction of the quantum of compensation awarded towards loss of benefit.

50. Any one who represents the estate of the deceased would be entitled to claim compensation towards loss to the estate. Such person who represents the estate need not necesarily be the heir of the deceased. But in this case the claimants being the brothers and sister of the deceased who was a bachelor and he having left no parents are his nearest heirs, they are undoubtedly entitled to claim loss to the estate of the deceased.

51. There can be no dispute that under the head "loss to the estate of the deceased" (which at times is called "loss of estate"), damages towards pain and suffering, loss of earnings and other damages actually suffered by the victim between the date of the accident and the moment of death, damages towards loss of personal property and damages for loss of expectation of life may be awarded (*vide* Halsbury's Laws of England, Volume 28, page 100). If a person who is injured lives for sometime but later succumbs to the injuries sustained in the accident, a person who represents the estate of the deceased can claim damages for the pain and suffering of the deceased as well as loss of earnings and other damages actually suffered by the victim between the date of the accident and the date of death. But in the present case, the man was killed instantaneously Therefore there was no pain and suffering to the deceased or any loss of earning from the time of accident till the time of death. There is also nothing to show that the deceased suffered any other damages due to the accident. Therefore the only ground on which compensation can be claimed under the head "loss to the estate of the deceased" is loss of expectation of life. What exactly is loss of expectation of life, is the question. As the law of torts is not governed by any statute, Courts in our country follow the principles laid down by the Courts in England. The earliest case which recognised damage towards loss of expectation of life is *Flint* v. *Lovell*[1]. That was a case not of death of the victim but only a case of injury to the victim. The Court of Appeal decided that the injured in that case, whose expectation of life had been diminished by reason of his injuries, was entitled to be compensated in damages for loss of expectation of life. The injured in that case was a man aged 61 years at the date of the accident. It was found as a matter of fact, by the trial Judge that in spite of old age, the injured had been in good health and good condition and, in the ordinary course of events, could expect to have lived for at least a further 8 or 9 years. The trial Court found that as a result of the injuries, his expectation of life had been very materially shortened. There was a compendious award of £4,000 towards pain and suffering, physical disabilities and loss of expectation of life. Damages for loss of expectation had not been separately indicated. In *Rose* v. *Ford*[2], the House of Lords held that damages for

1. (1935) 1 K.B. 354.
2. (1937) A.C. 826.

loss of expectation of life could be recovered on behalf of the deceased's estate in an action under the Law Reform (Miscellaneous Provisions) Act, 1934. *Flint* v. *Lovell*[1], is referred to by the House of Lords and they held that the principle laid down in that case, *viz.*, that damages can be claimed for loss of expectation of life, is not confined to the case where the injured person is alive at the date of the action and therefore the said damages can be claimed by the representative of the estate of the deceased as part of loss to the estate, as a cause of action which entitled the injured to sue for loss of expectation of life survived to the person representing the estate of the injured who died, under the Law Reform (Miscellaneous Provisions) Act, 1934. In *Benham* v. *Gambling*[2], the House of Lords explained the measure of damages for loss of expectation of life.

52. It is pointed out that damages given for shortening of life (loss of expectation of life) should not be calculated solely, or even mainly, on the basis of the length of life that is lost but they should be fixed at a reasonable figure for the loss of a measure of prospective happiness. It is also pointed out that if the character or habits of the deceased are calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is further pointed out that damage under this ground *viz.*, loss of expectation of life, is not on the basis of loss of future pecuniary prospects but it is only for the loss of a measure of prospective happiness. In the case before the House of Lords, the victim was an infant child of 2½ years and the father of the child who died in the accident claimed compensation for loss of expectation of life. The House of Lords reduced the award from £1,200 to £200 only. At page 166, Viscount Simon, L.C. spoke.

> "The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian Ethics than in the judgment of a Court of law, but in view of the earlier authorities, we must do our best to contribute to its solution. The learned Judge observed that the earlier decisions quoted to him assumed 'that human life is, on the whole, good'. I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant that, at any rate in one case we were informed, the jury refused to award any damages under this head at all. As Lord Wright said in *Rose* v. *Ford*[1], special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or at any rate as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects."

In *Yorkshire Electricity Board* v. *Naylor*[2], the claim was towards loss of expectation of life claimed by the mother of a victim who was aged 20 years and 4 months on the date of accident. The principles stated in *Benham* v. *Gambling*[3], were reaffirmed and the House of Lords said that only moderate figures should be chosen towards damages on this ground, *viz.*,

1. (1935) 1 K.B. 354.
2. (1941) A.C. 157.

1. (1937) A.C. 826.
2. (1968) A.C. 529.
3. (1941) A.C. 157.

loss of expectation of life. *Burns* v. *Edman*[1] is a case where the wife of a person who was killed in an accident claimed damages for loss of expectation of life. The deceased in that case had been leading the life of a criminal. It was pointed out that since the Court was entitled to take judicial notice of the fact that the life of a criminal was not a happy one, damages for loss of expectation of life, which in reality were damages for loss of the element of happiness in life, should be assessed only at half of the maximum sum usually awarded. Thus it would be clear that on the ground of loss of expectation of life, compensation is to be assessed only for the loss of future happiness and such assessment should be of a moderate amount. If there are materials to show that the victim would not have led a happy life if he had not been killed in the accident, the assessment of compensation for loss of expectation of life has to be lower than in normal cases. Loss of expectation of life has nothing to do with loss of earnings during the period in which the deceased would have lived but for the accident. In Road Accident by D.W. El iot and Harry Street, at page 208 the grounds on which loss to the estate of the deceaed can be claimed are summarised thus:

> "The estate can claim damages for the loss of earnings, pain and suffering and other damage actually suffered by the victim between the date of the accident and the moment of death. The House of Lords held in one case that the estate could recover for the loss of future happiness of the victim, but Viscount Simon was soon to persuade his fellow Law Lords that this claim should be strictly contained: the result is that no more than £ 500 or so is recoverable by the estate for this...... The estate cannot claim for loss of earnings in the period during which the victim would otherwise have lived; there is no claim for future loss of amenities or limbs and the like. These last denials do not rest on express statutory provisions; it is merely that the Courts in practice will not countenance those claims."

Charlesworth on Negligence, 4th Edn., at page 571, paragraph 1236, says that loss of the wages that the deceased would have earned during the years by which his life has been reduced are to be disregarded while assessing the loss of expectation of life. I would quote the relevant passage:

> "In assessing damages under this head, regard must be had to the injured party's normal expectation of life and not to his expectation of life in his injured condition, or to the fact that his injuries are such that he does not want his life to be prolonged or does not know it has been shortened. Loss of the wages he would have earned during the years by which his life has been reduced are to be disregarded. 'The only relevance of earnings which would have been earned after death is that they are an item of damages for loss of expectation of life, in the sense that they are one of the minor elements which indicate that a person earning a reasonable livelihood is more likely to have an enjoyable life.' Nothing can be awarded for loss of prospects of making provisions for dependants."

In *T.V. Gnanavelu and another* v. *D.P. Kannayya and others*[1], Ismail, J., had to deal with a case where loss of expectation of life had to be assessed in respect of a man aged 60 who was killed in a motor accident. The deceased was a retired Junior Superintendent of the Hindu Religious and Charitable Endowments Department and he was drawing a pension of only Rs. 35.15 per month. There was no prospect of his earning anything more in the years to come and there was no question of his saving anything out of it. But his sons, whom he had educated earlier, were fairly well-placed in life. It was also in evidence that the deceased though aged 60, was keeping good health. Considering these facts, Ismail, J., held that the deceased could have expected to be looked after well and maintained comfortably by his sons and that therefore by his death there was loss of prospective happiness to the deceased that the assessment of the same at Rs. 4,000 was not so excessive that called for interference and that the same could be claimed as part of loss to the estate of the deceased.

1. (1970) 2 Q.B. 541.

1. A.A.O. No. 35 of 1965.

53. On behalf of the appellants it cannot be contended that money which the deceased would have earned in future but for his death in the accident and the possible savings therefrom should also be taken as part of loss to the estate of the deceased. Such future earnings have nothing to do with loss of expectation of life except perhaps that the possible future earnings would be an element only for the purpose of finding out whether the man's life would have been happy if he had lived. The illustration given by the Supreme Court in *Cobald Motor Service Limited* v. *R.M.K. Veluswami*[1], cannot be construed as a proposition of law to the effect that loss of future earnings of the deceased would be part of loss to the estate claimable by the legal representatives of of the deceased. The case before their Lordships of the Supreme Court was one in which a sum of Rs. 25,200 had been awarded to the claimants towards loss of benefit and a sum of Rs. 5,000 had been awarded towards loss to the estate. The question that was argued before their Lorships of the Supreme Court was as to whether the sum of Rs. 5,000 awarded towards loss to the estate is a duplication and therefore it should go in reduction of the sum of Rs. 25,000 odd awarded for loss of benefit. Their Lordships at page 8, paragraph 13 concluded:

> "In the instant, case under section 1 of the Act both the Courts gave compensation to plaintiffs 2 to 7 in a sum of Rs. 25,200. This sum was arrived at by taking into consideration, *inter alia*, the reasonable provision the deceased, if alive, would have made for them. Under section 2 both the Courts awarded damages for the loss to the estate in a sum of Rs. 5,000. That figure represents the damages for the mental agony, suffering and loss of expectation of life. There was no duplication in awarding damages under both the heads."

Their Lordships of the Supreme Court stress the fact that the right of action in respect of compensation for loss of benefit and that towards loss to the estate are quite distinct and independent and that there was nothing wrong in awarding compensation under both the heads even though the claimants may be the same. However there can be no dispute that any sum paid to a dependant of the deceased (who is entitled to compensation towards loss of benefit) as compensation for loss to the estate would be a pecuniary advantage to him. But for the death of the deceased, there would be no occasion for the said dependant to receive compenation towards loss to the estate as a person representing the estate of the deceased. There can also be no dispute that any pecuniary advantage, including that by way of compensation for loss to the estate, should be taken into consideration in assessing the quantum of compensation payable for loss of benefit. Their Lordships of the Supreme Court do recognise this, for they quote with approval *Rose* v. *Ford*[1], and other cases of the Courts in England which make it clear that when the claimant under both the heads is the same, the sum awarded towards loss to the estate should go in reduction of compensation for loss of benefit. It is true that the Supreme Court upheld the award of Rs. 25,200 for loss of benefit in spite of the fact that Rs. 5,000 had been awarded under the other head, but there is nothing to show that in that case the trial Court in fixing the quantum of compensation towards loss of benefit had not taken into consideration the award under the other head. A sum of Rs. 25,200 had been fixed as the compensation for loss of benefit in that case and that works out only to about 8 years' purchase of the annual dependency. Considering the age of the deceased, his earnings, the benefits that the dependants would have got and other circumstances, it is quite possible that the trial Court would have fixed the compensation for loss of benefit at a higher amount but for the fact that a sum of Rs. 5,000 was being awarded towards loss to the estate. Only under such circumstances it has been held that there was no ground to reduce the sum of Rs. 25,200 awarded towards loss of benefit on the alleged ground that there was duplication in awarding damages. We are, however, not concerned with this aspect of the matter in the present case.

1. (1962) 1 S.C.J. 206 : (1962) M.L.J. (Crl.) 120 : (1962) 1 S.C.R. 929 : A.I.R. 1962 S.C. 1 at 8.

1. (1937) A.C. 826.

54. It is while discussing the point that the compensation awarded under the two heads, *viz.*, one for loss of benefit and the other towards loss to the estate, are two independent claims, their Lordships of the Supreme Court have referred to what is loss to the estate. It is pointed out that loss of expectation of life is part of loss to the estate which was recoverable under section 2 of the Fatal Accidents Act. In the concluding paragraph which I have quoted above, their Lordships have indicated what would constitute loss to the estate. It is stated that damages for mental agony and suffering and loss of expectation of life would be part of loss to the estate. In the above concluding paragraph, their Lordships have not stated that the expected future earnings of a deceased person or the possible savings therefrom would be part of loss to the estate. It cannot also be said that their Lordships were of the view that loss of expectation of life would include the expected future earnings of the deceased. It was already noticed that loss of expectation of life is nothing but loss of the element of prospective happiness. *Rose* v. *Ford*[1], referred to by us earlier and some other decisions of the Courts in England have been referred to by their Lordships of the Supreme Court with approval, though for the other aspect, *viz.*, that the two heads of claim are independent of each other but when the claimant is the same, the amount awarded towards loss to the estate should go in reduction of compensation for loss of benefit. Those decisions make it abundantly clear that loss of expectation of life is only loss of prospective happiness. The illustration in the decision of the Supreme Court was not for shewing what is loss to the esate, for the question that was under consideration by their Lordships was not as to what was loss of estate or what is loss of expectation of life. The question that was argued before them was that the sum of Rs. 5,000 awarded towards loss to the estate should go in reduction of the sum of Rs. 25,200 awarded towards, loss of benefit. Nowhere in the judgment of the Supreme Court there is any observation that the expected future earnings of the deceased or the savings thereform is, part of 'loss of expectation of life,' or any other item of loss to the estate. Under all these circumstances, the illustration cannot be understood as saying that the possible future earnings of the deceased or savings therefrom, are to be calculated as part of loss to the estate.

55. I have already said that in the present case the deceased did not undergo any pain or suffering as he had been killed instantaneously. So on the head of loss to the estate of the deceased, the only ground on which compensation can be awarded in this case is loss of expectation of life, *viz.*, *loss of prospective happiness*. The deceased was a young man and a manual labourer. But for the accident he can be expected to have a happy life as happiness does not depend upon wealth or status. If the deceased had not been killed but only crippled and thereby there was shortening of his life, he himself would have been entitled to claim compensation for loss of expectation of life. He having been killed, his legal representatives are entitled to claim the said compensation as part of the estate of the deceased. I think that a sum of rupees five thousand would be a proper assessment of compensation on this ground.

56. Accordingly, the appeal is allowed to the extent that there will be an award in favour of the appellants (claimants before the Tribunal below) for rupees five thousand, which sum is payable by the 2nd respondent the insurance company, within a month from this date. There will be no order as to costs.

Kailasam, J.—The facts of the case have been fully set out by my learned brother and need not be reiterated. The questions that arise in this Civil Miscellaneous Appeal are whether the accident was due to the negligence on the part of the driver of the lorry and whether the claimants who are the brothers and sisters of the person who was killed in the accident are persons entitled to compensation under section 110-A of the Motor Veh cles Act. I have no hesitation in concurring with the finding of my learned brother that the driver of the lorry was guilty of negligence. Regarding the question whether the brothers and the sisters of the deceased are entitled to claim compensation, there could be no difficulty in holding that they are entitled to compensation towards

1. (1937) A.C. 826.

loss of estate of the deceased; but not as claimants under section 1-A of the Indian Fatal Accidents Act, 1855 (VIII of 1855).

58. It has been held by this Court in *Palani Ammal* v. *The Safe Service Limited*[1], that sections 110-A to 110-F do not create any new right or even a new remedy; but the forum alone had been changed. The case law on this subject has been fully discussed by my learned brother and I agree with the preponderance of judicial opinion and the conclusion arrived at by my learned brother that the provisions in sections 110-A to 110-F of the Motor Vehicles Act, are only procedural and do not purport to confer any substantial right or liability on the parties.

59. I agree with the conclusion of my learned brother that all persons who are entitled to make an application for compensation under section 110-A of the Motor Vehicles Act. will be legal representatives of the deceased within the meaning of the said section; but I am unable to associate myself with the view that the definition of the term 'legal representative' in section 2 (11) of the Code of Civil Procedure, would not include all persons who are entitled to apply for compensation under section 110-A of the Motor Vehicles Act, and that rule 2 (*c*) of the Madras Motor Accidents Claims Tribunals Rules, 1961, which provides that the term "legal representative" shall have the meaning assigned to it under clause (11) of section 2 of the Code of Civil Procedure, is *ultra vires* the rule-making powers of the Government. On our conclusion that all claimants under section 110-A of the Motor Vehicles Act, are legal representatives of the deceased and are entitled to compensation as provided for under section 110-B, strictly the question as to whether, in view of the scope of the definition of the term 'legal representative' in section 2 (11) of the Code of Civil Procedure, rule 2 (*c*) of the Motor Accidents Claims Tribunals Rules, 1961, is *ultra vires* or not does not arise in this case. But as the question had been discussed at some length by my learned brother, I would indicate my opinion briefly.

60. The term "legal representative' was not defined under the old Code. Under the English law, the primary meaning of the expression is 'executor or administrator' though it may, under special circumstances be controlled by the context. In Indian law while in earlier cases a strict meaning was given to the expression 'legal representative', subsequently the term was construed to cover all persons representing the estate of the deceased person. Under the old Code, a strict meaning was given to the term 'legal representative' as in the English law. In *Dinamoni Chaudhurani* v. *Elahedut Khan*[1], the scope of the term 'legal representative' is discussed. Brett, J., in repelling the contention that the term should be construed strictly and cannot include anybody except the heir, executor or administrator of the deceased as the term and the definition were taken from English law and that when the Legislature used the term "legal representative' in the section and not the word 'representative' it must have intended to use it in the strict sense, observed, that the section appears to have been drawn for the protection of the decree-holders and to give them a right to relief against the successor in property or estate of the deceased judgment-debtor. The learned Judge held that the term 'legal representative' appears to have been used as one which would cover ordinary cases of succession. After discussing the case law on the point, the learned Judge held that both in English and Indian law cases have arisen in which the term 'legal representative has not been strictly confined to its primary meaning. It was held that the term 'legal representative' has been used in section 234, Code of Civil Procedure, to meet the circumstances of a certain event, *viz.*, the passing of the property, the subject of the litigation, on the death of the deceased judgment-debtor to her successor and to include such successor either to her estate or to the property in suit. It was further held that it should not be so strictly interpreted as to defeat the rights of, of a decree-holder in an exceptional case for which the Legislature could not have been expected to have otherwise specially provided. Woodroffe, J., observing that in their strictest and most ordinary sense the words 'legal

1. (1966) A.C.J. 19.

1. (1904) 8 C.W.N. 843.

representatives' are understood to mean executors and administrators only, held that the term is yet one which is naturally capable of a more extended sense than that in which it is ordinarily and strictly employed. The definition has also been extended to the case of a person who without title as administrator, executor, heir, reversioner or surviving coparcener is the *de facto* possessor of the estate of the deceased Hindu it having been held that he must be treated for some purposes as his representative and that a judgment obtained against such a representative is not a mere nullity. After an elaborate review of the authorities, the learned Judge summed up the position thus:—

"From this review of the authorities it will appear that judicial decisions have extended the sense of the term 'legal representative' beyond that of its ordinary meaning of administrator, executor, and heir, and though such extension has been attended with doubt and has in some cases been the subject of conflicting decisions it appears to me to be too late now to endeavour, however, convenient it might be, to secure for the term that which is perhaps its strict and legitimate sense. I agree, therefore, in holding that the term is not limited to administrators, executors and heirs and am of opinion that it must now be held to include any person who in law represents the estate of a deceased judgment-debtor."

The definition of the term 'legal representative' in section 2 (11) of the Code of Civil Procedure, is too wide and the Legislature has in fact given effect to the views expressed in *Dinamoni Chaudhurani* v. *Elahadut Khan*[1] and introduced the present definition of the term 'legal representative' in section 2 (11) of the Code of Civil Procedure which reads as follows:—

"'Legal representative' means a person who in law represents the estate of a deceased person and includes any person who intermeddless with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

According to the present definition, the term 'legal representative' is very wide in its amplitude and covers all persons who in law represent the estate of the deceased person. The words executor, administrator, etc., are all omitted and what is now required is that the person must in law represent the estate of the deceased person.

61. In *Shwe Mya* v. *Maung Ho Hnaung*[1] the word 'representative' was held to be a term of ambiguous meaning and it must be construed according to its context. In Stroud's Judicial Dictionary, it is stated that the meaning of the term 'representative', 'legal representative', 'personal representative' or 'legal personal representative' may be controlled by the context.

62. In *Andhra Bank Limited* v. *Srinivasan*[2] the Supreme Court after quoting with approval a passage from the judgment of Woodroffe, J referred to supra, held that a legatee who obtains only a part of the estate of the deceased under a will can be said to represent his estate under section 2 (11) of the Code of Civil Procedure. The Court held that the whole object of widening the scope of the expression 'legal representative' which the present definition is intended to achieve would be frustrated if it is held that legatees of different portions of the estate of a deceased do not fall within its purview. Thus, it is settled law that any person who becomes entitled to a part of the estate can be held to represent the estate and thereby a legal representative of the deceased.

63. The point that arises is whether a person who claims compensation on the death of a person is a person who in law represents the estate of the deceased person.

64. Section 1-A of the Fatal Accidents Act, 1855, provides that a suit for compensation to the family of

1. (1904) 8 C.W.N. 843.

1. (1923) 44 M.L.J. 732 : 49 I.A. 395 : A.I.R. 1922 P.C. 359.
2. (1962) 2 S.C.J. 676 : (1963) 1 M.L.J. (S.C.) 14 : (1963) 1 An.W.R. (S.C.) 14 : (1962) 3 S.C.R. 391 : A.I.R. 1962 S.C. 232.

a person for loss occasioned to it by his death by actionable wrong is maintainable. The section provides that such a suit shall be for the benefit of the wife, husband, parent or child, if any, of the person whose death has been caused and it shall be brought by and in the name of the executor, administrator or representative of the person deceased. In such an action, the Court will award damages in proportion to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. The amount shall be divided amongst the parties mentioned in such shares as the Court by its judgment or decree shall direct. Section 2 provides that not more than one action or suit shall be brought in respect of the same subject-matter of complaint and that in any such suit or action, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased. Reading sections 1-A and 2 of the Act as a whole, it appears that the scheme of the Act is for the administrator, executor or representative of the deceased to file a suit for the benefit of the dependants, and in such a suit to include a claim for any pecuniary loss to the estate of the deceased. *Prima facie*, the Act does not contemplate a suit by everyone of the dependants, but only a suit on behalf of the dependants by the executor, administrator or representative of the deceased.

65. The scope of sections 1-A and 2 of the Fatal Accidents Act 1855, came up for consideration in *Johnson* v. *The Madras Railway Company*[1]. The learned Judges in summing up the provisions of sections 1-A and 2 of the Act observed as follows:—

> "In cases where the deceased is represented by an executor or an administrator such an executor or administrator is given the power to sue for the compensation for the benefit of the specified relations. Where there is no executor or administrator or where there is one, and he fails, or is unwilling to sue, then in our opinion the suit may be instituted by, and in the name of, the representative of the person deceased. But one suit only is allowed to enforce the claims of all the persons beneficially entitled, it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. The right of each beneficiary is only to receive compensation in proportion to the loss occasioned to him by the death of his deceased relative".

Regarding the term "representative" of the deceased, the Court held that there was no reason for limiting the meaning of the word in a narrow way and found that the word meant and included all or any one of the persons for whose benefit a suit under the Act can be maintained, and that these persons are the representatives of the deceased in the sense that they are the persons taking the place of the deceased in obtaining reparation for the wrong done. This decision is an authority for the proposition that the word 'representative' of the deceased in Act XIII of 1855, would include any person who takes the place of the deceased for obtaining reparation for the wrong done. To be a 'legal representative' under section 2 (11) of the Code of Civil Procedure, a person in law must represent the estate of the deceased person. When a person is taking the place of the deceased as his representative, it would follow that he represents also the estate of the deceased. The extended meaning given to the word 'representative' of the deceased in *Johnson* v. *The Madras Railway. Company*[1], especially when the procedure contemplated under the Act enabled the executor, administrator or representative of the deceased to file a suit on behalf of the dependants and others, with equal force, will apply to the term 'legal representative', and the persons taking the place of the deceased for obtaining reparation for the wrong done will not only be representatives for the purpose of the Act (XIII of 1855), but also under section 2 (11) of the Code of Civil Procedure. It would be too narrow a construction that though

1. (1905) I.L.R. 28 Mad. 479 : 15 M.L.J. 363.

1. (1905) I.L.R. 28 Mad. 479 : 15 M.L.J. 363.

the persons taking the place of the deceased are representatives of the deceased, they are not the representatives of the deceased's estate. The observation in *Johnson* v. *The Madras Railway Company*[1], is that the term representative would apply to any person taking the place of the deceased in a suit under Act XIII of 1855 which would include a claim for the benefit to the estate also. It follows therefore that the definition of the term 'legal representative' in the context is wide enough to cover all persons who can maintain a claim for compensation taking the place of the deceased person. The extended meaning of the word 'representative' under Act XIII of 1855 has been given following *Johnson* v. *The Madras Railway Company*[1], in later cases like *Mrs. R. V. Penheiro* v. *M. Minney*[2].

66. Under sections 110-A to 110-F of the amended Motor Vehciles Act, the procedure has been made simpler and a suit by the executor, administrator or representative of the deceased on behalf of the claimants has been dispensed with and all the persons entitled to compensation are enabled to maintain an application under section 110-A, thereby giving effect to the extended meaning of the word 'representative' in section 1-A of the Fatal Accidents Act rendered in *Johnson* v. *The Madras Railway Company*[1]. In the circumstances, the term 'legal representative' can be construed as including all claimants under section 110-A of the Motor Vehicles Act.

67. The only other point that needs reference is the scope of the words 'loss of benefit to the estate'. This question has been fully dealt with by my learned brother and I do not want to add anything more except to state that taking all the circumstances, it does not appear that the Supreme Court by its illustration given in *Gobald Motor Service* v. *Veluswami*[3], intended to lay down that loss of future earning of the deceased would be part of loss to the estate claimable by the legal representatives, making a complete departure from the established law in England. As in this case the question does not arise, as the deceased who was a labourer would not have accumulated any earnings for future during his life time, the petitioners would not be entitled to any increase in the compensation awarded to them on the ground of likely loss of future earnings or savings therefrom occasioned to the estate of the deceased.

1. (1906) I.L.R. 28 Mad. 473 : 15 M.L.J. 363.
2. A.I.R. 1934 Cal. 655.
3. (1962) 1 S.C.J. 206 : (1962) M.L.J. (Crl.) 120 : A.I.R. 1962 S.C. 1.

S. J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

P. Bhoormal Tirupati .. *Appellant**

v

The Additional Collector of Customs Customs House, Madras-1. .. *Respondent.*

(A) *Customs Act (LII of 1962), sections* 110 (2), 124 *and* 153—*Seizure of goods—Notice for confiscation or imposition of penalty—Notice sent by registered post within six months of seizure—Notice returned with endorsement 'left'—If proper notice—Validity of proceedings.*

(B) *General Clauses Act (X of 1897), section* 27—*Meaning of service by post—Presumption.*

Under section 110 (2) and section 124 (*a*) of the Customs Act, a notice in writing informing a person of the grounds on which it is proposed to impose a penalty should be given within 6 months from the date of seizure of the goods. Under S. 153 of the Act, a notice issued under the Act shall be served by tendering the notice or sending it by registered post to the person for whom it is intended or to his agent. The section does not require that effective service should be effected on the person receiving it. Under section 27 of the General Clauses Act the normal presumption, unless the contrary is proved, is that the service shall be deemed to have been properly effected when a letter is properly addressed, pre-paid and posted by registered post. The mere endorsement "left" is not

* W.A. No. 155 of 1973. 22nd August, 1973.

sufficient to prove the contrary. Apart from it, a reading of section 27 of the General Clauses Act indicates that the proof to the contrary can only be limited to proving that the service had not been effected at the time at which the letter would be delivered in the ordinary course of post. [*Para.* 3.]

Held on facts :

That the notice was sent to the proper address, pre-paid and posted by registered post, is not disputed. No other attempt has been made to prove the contrary. The mere endorsement 'left' is not sufficient to prove the contrary. There has been proper service of notice.

[*Para.* 3.]

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramaprasada Rao, dated 23rd February, 1973 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 801 of 1971 presented under Article 226 of the Constitution of India, to issue a writ of *certiorari* calling for the records of the respondent therein dated 28th November, 1970 in O.S. No. 583 of 1968 R. D imposing a personal penalty of Rs. 15,000 under se.tion 112 of the Customs Act, 1962 and to quash the same.

K. Srinivasan and *K. C. Rajappa,* for appellant.

The Judgment of the Court was delivered by

Kailasam J.—The petitioner in the writ petition is the appellant before us. He filed a petition praying that the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent, Additional Collector of Customs, Custom House, Madras, dated 28th November, 1970 in O. S. No. 583 of 1968 R. D., imposing a personal penalty of Rs. 15,000 under section 112 of the Customs Act, 1962 and to quash the said order. The petition was dismissed by Ramaprasada Rao, J., holding that the order passed by the Customs authorities was proper and in accordance with law and the decision arrived at by them has to be sustained.

2. Mr. K. Srinivasan, learned Counsel for the appellant, questioned the correctness of the order of the learned Judge mainly on the ground that the requirement of sections 110 (2) and 124 of the Customs Act has not been complied with. His plea is that the goods were seized on 14th November, 1968 and a notice which was attempted to be served on the appellant could not be served on 8th May, 1969 as he had left the premises and later the notice of seizure was served on the appellant's Counsel on 3rd October, 1969. It was pleaded that as no notice of intention to seize the goods was served on the appellant within six months from the date of seizure as required by law, the entire proceedings are void. Section 110 (2) of the Customs Act provides that where any goods are seized under sub-section (1) of section 110 and no notice in respect thereof is given under clause (*a*) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. In this connection it is not necessary to refer to the proviso as no such notice extending the period was given as contemplated in the proviso. Section 124 (*a*) states that no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. Thus it will be seen from secti n 110 (2) and section 124 (*a*) that a notice in writing informing the appellant of the grounds on which it is proposed to confiscate the goods or to impose a penalty should be given within six months from the date of seizure of the goods. In this case on behalf of the Customs authorities the notice sent by registered post and returned with the endorsement 'left' on 13th May, 1969, which is admittedly within six months, is relied on, while on behalf of the appellant it is stated that this notice with the endorsement 'left' is not proper service and therefore could not be relied on.

3. The only point that arises is whether the service by registered post effected on 13th May, 1969, which was returned with the endorsement 'left', is sufficient notice. Section 153 of the Act states that any order or decision passed or any

summons or notice issued under the Customs Act, shall be served (*a*) by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent; sub-section (*b*) of section 153 need not be referred to as it does not arise in this case. A notice had been sent by registered post duly addressed to the appellant. The section requires that notice shall be served by sending it by registered post to the person for whom it is intended. The section does not require that effective service should be effected on the appellant receiving it. This position is made clear by reference to section 27 of the General Clauses Act which states that where any Central Act requires any document to be served by post, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The normal presumption, unless the contrary is proved, is that the service shall be deemed to have been properly effected when a letter is properly addressed, pre-paid and posted by registered post. That the notice was sent to proper address, pre-paid and posted by registered post is not under dispute. No other attempt has been made to prove the contrary. The endorsement 'left' is not sufficient to prove the contrary. Apart from it, a reading of the section indicates that the proof to the contrary can only be limited to proving that the service had not been effected at the time at which the letter would be delivered in the ordinary course of post. We find no difficulty in coming to the conclusion that there has been proper service of notice. The writ petition was rightly dismissed. This appeal fails and it is dismissed.

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Natarajan, JJ.*

E. M. E. Shanmugam Chettiar and others .. *Appellants**

v.

RM AN. Annamalai Chettiar alias **K. S. A. K. Annamalai Chettiar** .. *Respondent.*

Contract—Place and time of performance — Debtor and creditor — Deposit in foreign country—Suit in India for recovery of debt—Debtor seeking creditor—English common law doctrine — Applicability in India— Deposit in foreign country— No place of performance in repayment specified—Defendant resident in India — No offer by borrower to pay in foreign country on demand —Suit in India — Institution proper — Contract Act (IX of 1872), *section* 47 *and Civil Procedure Code* (*V of* 1908), *section* 20.

Though the English doctrine that the debtor should seek the creditor is not of general application in India and has to be applied with caution, yet the invocation of the rule depends on the facts and circumstances of each case. [*Para.* 7.]

In a given case, if the contract does not provide either expressly or by necessary implication the place of performance, then out of necessity and exigencies of those circumstances, the debtor should seek the creditor and offer to perform his part of the contract. [*Para.* 7.]

Thus though the rule of English common law is not unreservedly applied in India and there is pronounced disinclination to adopt the same, yet it is now settled that the place of payment has to be determined independent of the above maxim taking into consideration the following factors: (1) terms of the contract; (2) the circumstances attendant upon it; (3) necessities of the case; and (4) the statutory provisions of law such as those contained in the Contract Act or in the Code of Civil Procedure. [*Para.* 7.]

*A. No. 575 of 1967. 16*th October*, 1973.

Held on facts,

There is no clinching evidence to show that there is a place of business of the first defendant either in his individual capacity or as a partner at Penang. It is in evidence that the first defendant, the borrower was residing in India. When the plaintiff demanded payment of the monies, the defendant did not send any reply. The first defendant did not even offer to pay the amount at any specified place at Penang. The suit has been rightly instituted in Indian Courts.

Also held,

The suit is for recovery of money. Whatever may be the legal position of similar contracts entered into outside India between a citizen and an institution, such as a bank or an incorporated company having various branches, it cannot be said that an action to enforce payment of money by an ordinary citizen under a written contract entered into outside India, can only be instituted in a place otherwise in India. [*Para.* 11.]

Cases referred to :—

State Aided Bank of Travancore Ltd. v. *Dhrit Ram*, (1942) 2 M.L J 256 (P.C.): 69 I.A. 1 : A.I.R. 1942 P.C. 6; *Re Helbert Wagg and Company Ltd.*, (1958) 1 All E.R. 129; *Muthukanni Mudaliar* v. *Andappa Pillai*, (1954) 2 M.L.J. 731; I.L.R. (1955) Mad. 116 : A.I.R. 1955 Mad. 96; *Karuppan Chettiar* v. *Somasundaram Chettiar*, (1961) 1 M.L.J. 323 at 327: A.I.R. 1961 Mad. 122.

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga, dated 31st March, 1967 and passed in Original Suit No. 45 of 1966.

K. Yamunan, for Appellant.

K. Gopalachari and *G. Krishnan*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The defendants are the appellants. Plaintiff and the defendants belong to Nattukottai Chettiar community. The 2nd and the 3rd defendants are the sons of the 1st defendant. On 7th February, 1940 the plaintiff's adoptive father K. S. A. K. Raman Chettiar deposited under Exhibit A-1 at Koolim in Malayasia $2,397-53 with the 1st defendant who was then trading under the name and style of Y. M. Y. Firm as a money-lender, and on such deposit the 1st defendant executed Exhibit A-1, acknowledging the deposit and contracting to pay thavanai interest with three months rest. After the adoptive father's death, on 1st September, 1948 the plaintiff wrote Exhibit A-5, addressed to the 1st defendant putting him on notice of his adoption to Raman Chettiar and his status and right to demand the deposit as above and also apprising the 1st defendant of a legal proceeding between him and his father when he was alive on O.S. No. 9 of 1942, on the file of the Chief Court of Pudukkottai wherein his right to be paid under Exhibit A-1, was agreed to between himself and his father. Under Exhibit A-2 the decree passed by the Chief Court of Pudukkottai in O.S. No. 9 of 1942, the plaintiff became entitled to the amount which was in deposit with the 1st defendant under Exhibit A-1. The plaintiff, therefore, requested the 1st defendant under Exhibit A-5 to credit all the amounts payable under Exhibit A-1, in his name, or in the alternative called upon the 1st defendant to execute a fresh letter for the purpose. There was no reply. Thereafter the plaintiff issued the suit notice Exhibit A-7 which remained unanswered. He therefore filed the suit based on Exhibit A-1, calculating the amount due on the present exchange rate.

2. The 1st defendant contended that the Y. M. Y. Firm at Koolim is still existing, though as and from 1953 the firm is running as a partnership concern consisting of the 1st defendant as father and defendants 2 and 3 as his sons. Exhibits B-1, B-3 and B-4 are further documents filed by the 1st defendant in support of his case that the Y. M. Y. Firm, as a partnership firm, is still functioning in Koolim. The 1st defendant admits that $. 2,397-53 was credited in the Y. M. Y. Firm in 1940, which was then run by the 1st defendant in his own name and as sole proprietor thereof. According to the defendants, the amount was payable only at Penang under

Exhibit A-1, and therefore the suit for its recovery laid in the State of Madras, without the same being filed at Penang in accordance with the Malayasian Law, is not maintainable. It was further stated that the claim is barred in accordance with the Malayasian Law. In any event as the amount is a loan and not a deposit, the suit is barred even under the Indian Law.

3. The following issues have been framed: (1) Is the suit transaction a deposit or a loan? (2) Whether this Court has jurisdiction to entertain the suit? (3) Whether the suit is barred by limitation? (4) What is the correct rate of interest? (5) Whether the suit is not maintainable? (6) To what relief is the plaintiff entitled? The learned Subordinate Judge of Sivaganga found that under Exhibit A-1, the amount was deposited under a peculiar contract prevailing in the Nattukottai Chetty community, that it was not a loan pure and simple and that the deposit was payable on demand. He also found that the plaintiff was entitled by virtue of prior civil proceedings between himself and his adoptive father to file the suit. On the question whether the forum in which the action should have been brought was only Penang, the learned Subordinate Judge as a fact found that Penang has been referred to in general terms and in view of the fact that there was no permanent residence or place of business of the 1st defendant at Penang the suit was rightly instituted in India and is not barred under the provisions of the Indian Limitation Act, as Article 60 therein would be the correct Article which would apply to the facts of the case. In the result he found that the law of *lex loci contractus or lex loci solutionis* is not applicable and the Malayasian Law of limitation is not attracted, and decreed the suit.

4. Mr. Kesava Iyengar, learned Counsel for the appellants, who are father and sons, raised two contentions. Firstly that under Exhibit A-1, the amount is payable only at Penang, and secondly that the suit is barred under the provisions of the Malayasian Law of Limitation. No other point was urged excepting incidentally. Mr. Gopalachari, learned Counsel for the respondent, contending *contra* urged that the claim not being a debt pure and simple and as there was no rigid consensus between the parties regarding the place of performance, and as the word 'Penang' by itself is of wide import and does not either expressly or by necessary implication connote a specific place of performance, the respondent had to seek the appellants in India under the provisions of the Code of Civil Procedure, as the 1st defendant, the principal debtor, is admittedly residing in India. He would therefore sustain the judgment.

5. We shall now consider the import and content of Exhibit A-1. The money was deposited at Koolim by the plaintiff's father with the 1st defendant. At that time the 1st defendant was doing business under the name and style of Y. M. Y. Firm, but as sole proprietor thereto. Defendants 2 and 3 had no connection with the said business at that time. In fact, they have been impleaded herein as sons of the 1st defendant, so that any decree against the 1st defendant may bind them as against the assets of the 1st defendant in their hands. No doubt, under Exhibit A-1, there is a stipulation that the 1st defendant would repay the same at Penang. Based on this solitary contractual obligation, Mr. Kesava Iyengar, relying upon sections 47 to 49 of the Contract Act, urged that the place of performance is Penang and Penang only, and any suit to recover the deposit as evidenced by Exhibit A-1 cannot be maintained in a place other than the Courts in Malayasia situate in Penang.

6. Sections 46 to 50 of the Indian Contract Act, deal with the time and place of performance of contracts. Reliance was placed upon section 47 which runs as follows:

> "When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day, and at the place at which the promise ought to be performed".

No doubt, the 1st defendant agreed to perform his obligation withou reference to the promisee, namely, the plaintiff's father. The contractual prescription

as to the place of performance enumerated in section 47 is for the guidance of the promisor, namely, the 1st defendant, with which the promisee, namely, the plaintiff's father or the plaintiff, has nothing to do. Even assuming that the agreed place of performance of contract is Penang, the statutory obligation is on the 1st defendant to offer to perform the contract in accordance with the terms of Exhibit A-1. In the instant case there is no evidence, nor is it contended that the 1st defendant so offered to perform the contract at the place stipulated, namely, Penang, at any time after the execution of Exhibit A-1. In his evidence the 1st defendant would admit that he returned to India in 1941 from Koolim and that he did not go to Malaya after 1941 and for the past 10 or 15 years he had no passport to visit Malaya. It is very clear that soon after, and indeed a year after, the 1st defendant executed Exhibit A-1, he came away to India and never intended to perform the contract even according to the interpretation placed by him through his Counsel. It is therefore clear that the 1st defendant as promisor did never exert himself to perform the contract at the alleged place at which the promise ought to be performed. He cannot therefore approbate and reprobate and call for his assistance section 47 of the Contract Act. Surely under section 47 there is no legal obligation on the part of the promisee to seek for performance of the contract at the place where the promisor ought to have performed the contract. It is open to him to avail himself of the common law and seek his debtor and institute an action in accordance with the law of that country in which he seeks to file the same and recover the amount due under Exhibit A-1. This is what the plaintiff has done.

7. Though the English doctrine that the debtor should seek the creditor is not of general application in India and has to be applied with caution, yet the invocation of the rule depends on the facts and circumstances of each case. In a given case, if the contract does not provide either expressly or by necessary implication the place of performance, then out of necessity and exigencies of those circumstances the debtor should seek the creditor and offer to perform his part of the contract. Thus though the rule of English common law is not unreservedly applied in India and there is pronounced disinclination to adopt the same, yet it is now settled out that the place of payment has to be determined independent of the above maxim taking into consideration the following factors: (1) terms of the contract; (2) the circumstances attendant upon it; (3) necessities of the case; and (4) the statutory provisions of law such as those contained in the Contract Act or in the Code of Civil Procedure. Bearing the above principle in mind, we can at once dispose of the serious contention of Mr. Kesava Iyengar that the deposit was repayable *only* at Penang. The expression that the money will be paid at Penang is of an uncertain import. The 1st defendant was carrying on business at Koolim. He had no business at Penang at or about the time when he executed Exhibit A-1. Even the evidence let in to substantiate, that as on the date of suit the 1st defendant is a partner of a firm at Koolim does not establish that he has a business place at Penang. He would only pretend that he has business connections in Penang, which is 30 miles away from Koolim. There is no clinching evidence to show that there is a place of business of the 1st defendant either in his individual capacity or as a partner at Penang. It is only in circumstances, where the place of performance could be deciphered from the terms of a contract the argument that the cause of action primarily arises only at that place could be successfully urged. But if a contract does not provide either expressly or by necessary implication such a place of performance then we have alrady referred to the general provisions which could be availed of by a creditor for instituting a suit on such a contract and in a Court where the defendant has his usual place of residence. It is not in dispute that even in 1941, the 1st defendant as the borrower under Exhibit A-1 was residing in Mahibalampatty, Tirupattur Taluk, Ramanathapuram District, South India. It is the Court which has jurisdiction over this place which was resorted to by the plaintiff for recovery of the deposit under Exhibit A-1. This would squarely satisfy the essential factors which are necessary to be considered to determine

the place of performance of a contract if such a place is not named or such could not be found by necessary implication either. The suit therefore cannot be paid said to have been improperly laid.

8. The other alternative argument of Mr. Kesava Iyengar, is that the 1st defendant should be deemed to be carrying on business at Koolim since he was running a partnership firm, though along with his sons the 2nd and the 3rd defendants. No doubt, there is evidence under Exhibits B-1, B-3 and B-4 which touch upon the partnership business carried on by the defendants. Under Exhibit B-1, the general nature of the business is described as real property owners and the date of commencement of business is given as 1st January 1951. Here again we have a reference to the usual residence of the 1st defendant as Mahibalampatty, Tirupattur Taluk, Ramanathapuram District, South India, whereas the usual place of residence of defendants 2 and 3, is given as 64, Jalan Raya, Koolim. The partnership business apparently was started 11 years after the 1st defendant received the deposit under Exhibit A-1. The nature of the business in the partnership is not money-lending business. It is not known, nor is there any evidence to show that the partnership business took over all the obligations and responsibilities of the 1st defendant as the proprietor of the Y.M.Y. Firm, which was solely a money-lending firm. D.W. 1, in his evidence would say "In our accounts, the amounts have been credited in the name of K.S.A.K. Raman Chettiar of Arimalam (plaintiff's adoptive father)". It is not clear as to what he means by "our accounts", because he was aked to produce his kurippu and peredu (ledger and day book), but in his evidence he says "I have not produced them". He will hesitantly say in the box that the 2nd and 3rd defendants also are doing money-lending business, but he does not know in what vilasam they were doing such business. There is therefore no positive evidence adduced by the 1st defendant that defendants 2 and 3 have taken over all the responsibilities and obligations including that arising under Exhibit A-1, when the partnership business was started in 1951. On the other hand we have no hesitation in coming to the conclusion that the transactions which the 1st defendant had as sole proprietor of the Y.M.Y. Firm in 1940, were distinct and separate from the partnership business started by him along with his sons in 1951 not only because the nature of the business is different but also because there is no continuity in the quondam Y.M.Y. Firm. There is no nexus between the quondam proprietary firm of Y.M.Y. with the later constituted firm of Y.M.Y. in the name of all the defendants. Defedndants 2 and 3 discretely kept themselves outside the box. If, therefore, the contract as reflected under Exhibit A-1 is a pointer to a specific dealing as between the plaintiff's father on the one hand and the 1st defendant on the other, then the plaintiff's father or his successors in interest, namely, the plaintiff, could only bring a personal action against the promisor on the basis that it is a deposit payable on demand by the promisor. The plaintiff cannot in the circumstances file a suit against the partnership firm of Y.M.Y. which is a stranger to the contract and with which neither the plaintiff nor his father had any dealings.

9. We have already referred to the fact that the 1st defendant came away from Koolim in 1941 and settled in Mahibalampatty, Tiruppattur Taluk, Ramanathapuram District, South India, and never returned to Malaya. It has not been established that the Y.M.Y. Firm which belonged to the 1st defendant on the date when the deposit was taken, ever had a place of business after 1941 at Penang or at Koolim. Again, there is no evidence to show that the quondam Y.M.Y. Firm had any place of business at Penang. On the other hand, we have already referred to the fact that the partnership firm of Y.M.Y. had no place of business at Penang. Under these circumstances we do not agree with Mr. Kesava Iyengar that the suit ought to have been filed at Penang in accordance with Malaysian law.

10. There is evidence to show that the plaintiff called upon the 1st defendant even in 1048 to make necessary entries consequent upon his acquisition of a right to demand the deposit and claim for payment thereof. The 1st defendant did not even therein offer to pay the amount at any specified place in Penang, nor did he reply to the said demand.

The suit notice was not answered. In these circumstances, we conclude that the suit has been properly laid and the forum has been rightly selected.

11. The suit is for the recovery of money. Whatever may be the legal position of similar contracts entered into outside India between a citizen and an institution, such as a bank or an incorporated company having various branches, as was pointed out in *State Aided Bank of Travancore Limited* v. *Dhrit Ram*[1], it cannot be said that an action to enforce payment of money by an ordinary citizen under a written contract entered into outside India, can only be instituted in a place otherwise than in India. In the above case the plaintiff who was a permanent resident and employee in Bombay wrote in September, 1936 to the State Bank of Travancore at Alleppey and enquired about the rates of interest allowed on fixed deposits. On 1st October, 1938, the plaintiff paid Rs. 11,000 to the account of the bank in the National City Bank of New York, Bombay, filled up the necessary forms and wrote to the Bank at Alleppey requesting them for the issue of a fixed depsoit receipt. On 6th October, the Bank issued the deposit receipt with effect from the 1st instant. Similar transaction took place in March, 1937 also. In March, 1938, when the second deposit became due, the Bank was in difficulties and was postponing payment. All proceedings against the Bank were stayed. A scheme of arrangement was approved by the creditors. Thereafter the plaintiff commenced an action in Bombay to recover the amounts due to him. In those circumstances it was held that the place where the contract was made as well as the place where the contract was to be performed was Travancore and the law of the State governs the transaction. The learned Law Lords gave sufficient weight to the fact that the dealings were with a banking institution and in such cases a banking transaction should be deemed to have been entered into at the onlyo ffice of the Bank wherein ordinary banking business of this kind has to be comnleted. In those circumstances they held that the contract in that case was to be performed at Travancore.

We may at once refer to Re *Helbert Wapg and Co., Ltd.*[1]. The learned Judge quoted Romer, L.J., and observed that he knows of no authority for the proposition that a simple contract debt is situate in a country at a time when the debtor is not resident there. Cheshire on Private International Law, 7th Edn. at page 421, has succinctly put the proposition thus:

"This rule, that a chose in action, such as a right to recover a loan or money due under an insurance policy, is situated in the country where the debtor resides, encounters an apparent difficulty where, as will often occur in the case of a corporation, the residence extends to two or more countries. Although the place of residence is chosen because it is there that recovery by action is possible, it has been suggested that a debt is situated in the country where it is payable even though this does not represent the residence of the debtor. The Courts, however, have not taken this view. They have insisted that the residence of the debtor is 'an essential element in deciding the situs of the debt'. If the debtor resides in two or more countries, then, indeed, the debt is situated in the one in which "It is required to be paid by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of bsuiness.

If, however, the debtor resides only in one country, it is there alone that the debt is situated notwithstanding that it may be expressly or implicitly payable elsewhere".

In *Muthukanni Mudaliar* v. *Andappa Pillai*[2], Rajamannar, C.J., presiding over the Court—observed that a suit can be instituted for personal relief against a defendant in a Court within the local limits of whose jurisdiction the defendant is residing or carrying on business on the date of the institution of the suit, wherever the cause of action for the suit had arisen, and to such a suit, the provisions of the statute of Limitation in force in the country of the forum, *i.e.*, the

1. (1942) 2 M.L.J. 256 (P.C.) : 69 I.A. 1 : A.I.R. 1942 P.C. 6.

1. (1958) 1 All E.R. 129.
2. I.L.R. (1955) Mad 116 : (1954) 2 M.L.J. 731 : A.I.R. 1955 Mad. 96.

'*lex fori*' would apply. In *Karuppan Chettiar* v. *Somasundaram, Chettiar*[1], the principle that the law which governs a contract depends on the intention of the parties, express or implied, has again been reiterated. When there is no intention expressed in the document which is decipherable, clearly Courts are left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed. Considering the authorities we are of the view that the plaintiff was in order in seeking the forum of an Indian Court for realisation of the deposit after demand as it was well within the law of limitation prevailing in this country to do so.

12. As the plaintiff's status and the right to demand payment back of the deposit is not in dispute, the only other argument of Mr. Kesava Iyengar, is whether the suit is barred by limitation under the Malaysian law of limitation. The Limitation Ordinance, 1953 of the Federation of Malaya was referred to for the purpose. Section 23 of the said Ordinance, which was solely relied upon, runs thus:

> "Subject to the provisions of sub-section (1) of section 22 of this Ordinance, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to recieve the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due."

This section is inapplicable even if it is said that the Malaysian law is attracted in the instant case. Here the claim is not in relation to an estate of a deceased person or to any share in such estate. As already pointed out, the plaintiff obtained a right in himself to demand the deposit under Exhibit A-1, even when his father was alive. Therefore this section is not applicable. But off the record Mr. Kesava Iyengar, relies on one other section to sustain his contention as to the bar of the suit under the law of limitation availing in Malaya. The 1st defendant cannot take advantage of the said law of limitation since he came away from Malaya in 1941 and ceased his connections therein. He chose Mahibalampatty as his permanent place of residence. He has no place of business at Penang, and, as already stated, the word 'Penang' is vague and uncertain and cannot therefore be understood as a definite place where the performance can be demanded. We have already dealt with this aspect and referred to section 20 (3) of the Civil Procedure Code, which would enable the plaintiff to file the suit in India since the 1st defendant was a permanent resident therein. In accordance with Article 60 of the Limitation Act, the cause of action is not barred until the lapse of three years from the date of demand. The plaintiff demanded payment by notice Exhibit A-7, dated 15th October, 1963, which was acknowledged by the 1st defendant in Exhibit A-8 on 16th October, 1963. The plaint was filed on 9th October, 1966, well within three years from the date of demand. As the law of *lex loci fori* and not *lex loci contractus or lex loci solutionis* applies to the facts of this case, we are in agreement with the learned Subordinate Judge, that no provision of the Limitation Ordinance, 1953 of the Federation of Malaya will non-suit the plaintiff.

13. For all the above reasons the appeal fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

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1. (1961) 1 M.L.J. 323 of at p. 327: A.I.R. 1961 Mad. 122.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

The Nadar Mahajana Sangam by its General Secretary, V.P.R Gangaram Dorairaj .. *Appellant**

v.

The Madurai Municipality represented by its Executive Officer, the Municipal Commissioner .. *Respondent.*

Madras District Municipalities Act (V of 1920), Schedule IV, rules 4 (1) and 8 (2)—Building used to run boarding and lodging house—Addition to building—Enhancement of property tax—Assessment of rental value—Proper method of determining—Procedure—Defective determination—Levy not valid.

Where inadequacy of municipal assessment arises as a result of addition to existing building or reconstruction of existing building the assessment books could be rectified only by invoking rule 8 (2) in Schedule IV of the Madras District Municipalities Act by the executive authority.

Where the original valuation adopted by the executive authority was wrong the Municipal Council can invoke rule 4 (1) and correct the valuation adopted by the executive authority. [*Para.* 5.]

Where in determining the rental value of a building used for running a lodging and boarding house, the cost of the services etc., provided had not been properly ascertained and deducted from the gross receipts before the actual rental value for the building was fixed, enhanced levy of property tax made on the basis of the defective rental valuation has to be set aside. [*Para.* 9.]

Cases referred to :

Municipal Council v. *Bandi Butchayya*, (1958) 1 An.W.R. 66; *Shanmugham* v. *Coimbatore Municipality*, (1970) 2 M.L.J. (S.N.) 19; *V.S.T.T.H., Madarasa* v. *Melapolayam Municipality*, (1959) 2 M.L.J. 92 : I.L.R. (1959) Mad. 906 : A.I.R. 1959 Mad. 506; *Ramanarain Sons Limited* v. *Assistant Commissioner of Sales Tax*, (1955) 2 M.L.J. 302: A.I.R. 1925 Mad. 394; *Municipal Corporation of Greater Bombay* v. *R.W. India Turf Club Limited*, (1968) 2 S.C.J. 207; (1968) 1 S.C.R. 625 : A.I.R. 1968 S.C. 425; *Municipal Council, Tirunelveli* v. *Haniffa*, (1969) 2 M.L.J. 495.

Appeal against the Decree of the District Court, Madurai in Appeal Suit No. 181 of 1970, preferred against the decree of the Court of the District Munsif of Madurai Town in Original Suit No. 1222 of 1698.

A. Shanmugavel and *Jayalakshmi Shanmugavel*, for Appellant.

S. Mohan and *K. Alagiriswami*, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff, Nadar Mahajana Sangam is the appellant herein. It filed a suit against the defendant, the Madurai Municipality for a declaration that the enhancement of property tax from Rs. 1,426-50 to Rs. 3,282-39 per half year made in 1968 was invalid and for a permanent injunction restraining the Municipality from collecting the enhanced tax. Its case was that it was running a boarding and lodging house in East Masi Street, Madurai Town from 1965, that it is collecting a rent of Re. 1 for a single room and Rs. 2 for a double room per day, that the Municipality originally levied and collected tax at Rs. 1,426-70 per half year based on the said rentals, that in 1968 the Municipality suddenly enhanced the tax to Rs. 4,416-08 for a half year, which was however reduced by the Municipal Council to Rs. 3,282-39 and that the enhancement in tax from Rs. 1,426-50 to Rs. 3,282-39 is illegal and arbitrary. The plaintiff also questioned the validity of the assessment proceedings on the ground that the procedure contemplated under the Madras District Municipalities Act has not been duly followed.

2. The defendant contended that the plaintiff is running a boarding and lodging house with 36 single rooms, 7 double rooms and 2 deluxe rooms apart from three dining-halls, two kitchens and store rooms with a running hotel, that the said lodge situate in the busiest locality in Madurai Town, has got good business, that the actual rents collected by the

*S.A. No. 1491 of 1971.

1st *March*, 1973.

plaintiff for all the rooms is much more than Re. 1 and Rs. 2 for single and double rooms respectively, that the plaintiff for the purpose of avoiding a higher tax by the municipality has resorted to the device of collecting rents under various heads such as charges for electricity, bedding, hot—water, service, donation etc, and that, therefore, the property tax was raised on the basis of the actual rents, received in accordance with the provisions of the Madras District Municipalities Act and the rules framed thereunder after issuing proper notice to the plaintiff and after hearing his objections. The defendant also contended that the suit is barred under section 354 of the Madras District Municipalities Act.

3. The trial Court accepted the case of the municipality and dismissed the suit.

4. On appeal, the lower appellate Court considered the following two points (1) whether the enhancement of tax under rule 4 of Schedule IV of the Madras District Municipalities Act is not valid for the reason that no opportunity was given to the plaintiff to make its representations and (2) whether the basis of calculation of annual income of the lodge is arbitrary as alleged by the plaintiff. The lower appellate Court held that the enhancement of tax has rightly been made under rule 4 of Schedule IV and that the plaintiff had due and effective opportunity to make its representations, before the enhancement was made. With regard to the basis of the calculation of the annual rental value, it held that the basis adopted by the municipality is both on the hypothetical value as well as profits basis and that it is neither arbitrary nor capricious. In that view the lower appellate Court confirmed the decision of the trial Court.

5. In this appeal the plaintiff reiterates the same two contentions which were urged before the lower appellate Court. So far as the first contention is concerned, it is said that the enhancement could have been made only under rule 8 (2) and not under rule 4 of Schedule IV. According to the learned Counsel any amendment of the assessment books at any time between one general revision and another will have to be made only under rule 8 (2) and the revision made in this case under rule 4 cannot, therefore, be valid. The learned Counsel refers to the decision in *Municipal Council* v. *Bandi Butchayya*[1], in support of his stand. In that case Bhimasankaram, J. said that the primary object of rule 4 is to direct an amendment of the register so as to show the correct assessment and not to deal with the merits of the assessment, that an amendment made might occasionally involve an enhancement to tax but it does so only indirectly and that from a reading of rules 4 and 6 to 11 of Schedule IV together it is clear that whenever the value of the property is to be altered it has to be done only by the executive authority under rule 8 and not by the Council under rule 4. The learned Judge took note of the words "inadequately assessed" in rule 4 (1) and stated that though the words would cover cases of under-assessment due to wrong valuation of the rent to be taxed as well as cases of such assessment due to wrong amount being taxed on the basis of correct valuation, rule 4 is intended to cover the former case and rule 8 will come into play in the latter case, where wrong amount of tax has been fixed on the basis of a correct valuation. With respect, I am not inclined to accept the reasoning given by the learned Judge and to restrict the scope of the words "inadequately assessed" contained in rule 4. It may be that rule 4 partly serves the purpose contemplated by rule 8. But it must be remembered that rule 4 deals with the power of the municipal council while rule 8 deals with the powers of the executive authority. It is not possible to restrict the power of the municipal council under rule 4 only to cases where inadequacy in assessment arises by reason of wrong calculation of tax on the basis of correct valuation and not where the valuation adopted by the executive authority is wrong. As pointed out by Ismail, J., in *Shanmugham* v. *Coimbatore Municipality*[2], rules 4 (1) and 8 (2) are intended to operate in two different circumstances. Ismail, J., has held in that case that the question whether a property has been inadequately assessed or not will have relevancy to the point of time at which the original assessment was made, that if the property undergoes change as a result of which the assessment has to be altered, no

1. (1958) 1 An.W.R. 66.
2. (1970) 2 M.L.J. 19 (S.N.).

question of the property originally having been inadequately assessed will arise, and that in such a case the assessment books have to be amended only by invoking the power under rule 8 (2). According to the learned Judge if inadequacy of assessment arises as a result of additions to the existing building or reconstruction of the existing building the assessment books could be rectified only by invoking rule 8 (2) and not rule 4 (1). I am therefore, of the view that rule 4 (1) has been properly invoked in this case.

6. As regards the second contention that the basis adopted for fixing the annual value is arbitrary, it is submitted by the learned Counsel for the appellant that the defendant in this case has adopted the annual value by taking the gross receipts giving an arbitrary deduction of 50 per cent therefrom for services etc. and that the cost of services etc., has not been duly and properly valued. According to him there are four call boys, two sweepers, two clerks, one manager and one watchman. The rooms have been furnished with cots, Dunlop mattresses, Dunlop pillows, a table, a chair, a teapoy and a mirror and all rooms are electrified and bath attached. A hotel is also run for the convenience of the lodgers though an aggregate sum of Rs. 4 is collected for a single room and Rs. 8 for double room, the actual rent is only one rupee for single rooms and Rs. 2 for double rooms and the balance represents the amounts collected under various heads for various services. It is said that for each room 50 paise is charged for electricty, 50 paise for bedding, 50 paise for hot water, 50 paise for sanitation and 50 paise for services and 50 paise towards donation. In this connection the learned Counsel also points out that even under proviso (*b*) to section 82 (2) the value of the furniture has to be excluded from the valuation. In support of his stand the learned Counsel referred to the following decisions.

7. In *V. S. T. T. H. Madarasa* v. *Melapalayam Municipality*[1], Ramachandra Iyer, J. (as he then was) while considering the proper basis for the levy of property tax in respect of private markets held that having regard to the nature of the fees that are generally collected in a market, it cannot be said that all of them constitute income from the property as such, that, the levy of property tax by a municipality in respect of a market on the basis of a gross income is not correct as that income would include not only the rent for the use of the property but also other payments made or fees received by the owner of the market and that, therefore, the fees levied in a market which are not in the nature of rent but which could by virtue of section 260 (2) of the District Municipalities Act and the notifications issued thereunder be collected could not properly form the basis for assessment of property tax on the market. He also held that where an assessment of tax includes an item which could not properly be included, the whole assessment would be invalid, unless the part which is invalid is severable from the rest, relying on the decision of the Supreme Court in *Ramanarain Sons Limited* v. *Assistant Commissioner of Sales Tax*[1]. The Supreme Court in *Municipal Corporation of Greater Bombay* v. *R.W. India Turf Club Limited*[2], considered the basis for the levy of property tax in respect of certain premises where a club was being run by a lessee. In that case it was held that the annual value has to be worked out on the basis of what a hypothetical tenant would be willing to pay as rent of the premises to a hypothetical landlord who is prepared to let the premises from year to year as they stand, having regard to all the advantages and disadvantages relating to such premises, such as, the situation, the nature of the property, the obligations and liabilities attached thereto and other features, if any, which enhance or decrease their value to such a tenant and that though the statute is silent as to the method by which the annual rent and rateable value is to be fixed, the municipality can also adopt any one of the following four methods namely (1) comparative method, (2) contractor's method, (3) unit method and (4) profits basis method. In that case the Supreme Court found that the profits basis method had been adopted by the assessing authority but the proper deductions have not been given to find out the

1. (1959) 2 M.L.J. 92: I.L.R. (1959) Mad. 906: A.I.R. 1959 Mad. 506.

1. (1955) 2 M.L.J. 302: A.I.R. 1955 Mad. 394.
2. (1968) 2 S.C.J. 207: (1968) 1 S.C.R. 625: A.I.R. 1968 S.C. 425.

net yield from the property. Their Lordships of the Supreme Court pointed out:

"The profits basis method which the assessing authority has adopted in the present case consists in ascertaining the rent annual value of the premises which has to be worked out from the profits which are made and which are capable of being made out of the premises. The gross receipts form the starting point of the calculation and they are those shown in the assessee's accounts for the account year concluded last before the making of the proposal. When these have been ascertained, the next step is to deduct therefrom the expenses of earning those receipts, the cost of repairs, insurance and other expenses necessary to maintain the premises is a state to command the hypothetical rent .... It must be remembered that it is not the profits which are rateable; they serve to indicate the rent at which the premises might reasonably be expected to let, particularly where profit is the motive of the hypothetical tenant in taking the hereditament. This method at one stage used to be adopted in the case of public utilities only. But there are a number of decisions which show that at a later stage it began to be employed to other premises also such as football stadia, markets, race courses etc."

8. The principle of the above decision was followed by this Court in *Municipal Council, Tirunelveli* v. *Haniffa*[1]. In that case the basis of the valuation adopted by the Tirunelveli Municipality in relation to a building called "Nellai Lodge" in Tirunelveli came up for consideration. There, the owner of the premises consisting of seven rooms had let out the same to a certain lessee for running a lodge on a monthly rental of Rs. 210. Subsequently the property tax originally levied on the premises at Rs. 208-10 per half year was enhanced to Rs. 768 calculated on the basis of the net income which could be secured by the lessee by letting out the rooms. The claim of the municipality was that each room would fetch a sum of Rs. 5, per day, that giving an allowance for the vacancy, for 20 days the rent that each room would fetch would be Rs. 100 per month and for seven rooms it would came to Rs. 700 and that after deducting the cost of expenses for maintenance, advertisement charges, salaries, services etc., the rental value under section 82 would easily come to Rs. 768 per half year. The said enhancement was challenged in a civil Court. Ramamurti, J., speaking for the Bench expressed the view that under section 82 (2) the annual value of the property shall be deemed to be the gross annual rent at which it may be reasonably expected to be let from month to month or from year to year subject to certain deductions, that is, the rent which the hypothetical tenant may be reasonably expected to pay for the property in question, that though the proviso (*a*) to the said sub-section provides an alternative method of valuation called the contractor's method under normal circumstances the municipality would determine the value under that method only in cases where it is not possible to determine the annual value on the basis of the gross annual rent at which the building may be reasonably expected to be let and that the Municipality has got a right to adopt either the method contemplated in sub-section (2) or the method referred to in the proviso thereto. The learned Judge referred with approval the following statement in Ryde on Rating, 11th Edn. at page 437:

"Cost or capital value can only be referred to in the absence of the best evidence, namely that of actual rents, and even in cases where there are no actual rents, the evidence afforded by the receipts and expenditure or by the assessments of comparable hereditaments will often be a better guide to the hypothetical rent than cost."

The learned Judge ultimately observed:

"Though the municipality while determining the annual rent value is not bound by the actual rent paid by the tenant, the rent fixed under the lease deeds should normally be taken as the best *prima facie* evidence in the absence of proof that any other element was responsible for fixing up a lower rent. If the municipality wants to enhance the

1. (1969) 2 M.L.J. 495.

rent, there must be proof that a hypothetical tenant intending to use the property for the same purpose would pay more. It is not the case of the municipality that properties similarly situated with similar advantages can reasonably be let for a higher rent; again it is not the case of the municipality that the rent fixed under the several lease deeds is not an adequate or reasonable rent or there has been any deliberate under-valuation. If the claim of the municipality based upon the subsequent use to which the tenant would put the property in future were accepted, it will lead to strange and anomalous results besides serious hardship and injustice to the owners of the property.'

The learned Counsel for the appellant very strongly relies on the above observations of Ramamurti, J. and submits that the actual amount collected as rent should be taken as the basis for arriving at the rental value and not the other amounts which are collected towards services, hiring of furniture, etc.

It is seen from Exhibit B-1 the inspection report dated 20 March, 1968 of the Commissioner of the defendant-municipality that the annual value has been arrived at as under:

36 single rooms at Rs. 4 per day	Rs. 144-00
7 double rooms at Rs. 8 per day.	56-00
2 De luxe rooms at Rs. 5 per day.	10-00
Total per day.	210-00
Total rent per month for all the rooms	6,300-00
50 per cent reduction for vacancy, services etc.	3,150-00
Net for the rooms	3,150-00
Rental value for office rooms: 3 dining halls and store rooms.	200-00
Total rent per month	3,350-00
Annual rental value.	Rs. 37,520·

The above calculation shows that the municipality has adopetd a hybrid method in that for the rooms it had adopted the profits basis method, and for the other portions of the building it had adopted the rental basis. It is not, therefore, possible to agree with the learned Counsel for the appellant that the method adopted in this case is exclusively profits basis. It is not also possible to accept the case of the municipality that the basis adopted is exclusively, the rental basis. But whatever be the method that has been adopted, the question is whether proper deductions have been allowed so as to arrive at the annual rental value. The above calculation shows that the municipality has taken the actual amounts collected from the occupants of the rooms as the rents received and has given thereform a deduction of 50 per cent towards vacancy and services etc. It is not clear whether the cost of services referred to includes the cost of providing bedding, furniture etc. If the 50 per cent deduction represents the actual cost of providing furniture bedding and other services, it may not be possible to question the validity of the assessment. But in this case, though in Exhibit B-1 it is stated that "till now in cases of lodges the Council has been adopting a policy of taking the total income into account and then giving a certain percentage (usually 50 to 60 per cent) as allowance for the service charges and, or likely vacancies, there is no reason for this lodge to be treated separately and that the fact that the management is issuing receipts artificially under various heads need not make the Council change its policy". No evidence has been produced before the Court to show that the deduction at 50 per cent has uniformly been adopted in respect of all the lodges in the city, nor any rule or by-law fixing 50 per cent as the quantum of deduction has been pointed out. As a matter of fact the municipality examined D.W. 1 its Assistant Revenue Officer and in his evidence he does not indicate anywhere the basis for taking 50 per cent of the receipts as vacancy and service charges etc. Both the Courts below have held that the rental value fixed by the municipality is neither arbitrary nor capricious, presumably on the ground that deduct-

ion of 50 per cent is sufficient to cover the service charges etc. The lower appellate Court says this:

> "I am unable to see anything arbitrary or capricious in the assessment. For example, if the plaintiff-lodge does not charge anything for rent but collects adequate amount from the lodger under various heads like donation, charges for electricity service, bedding etc., would it mean that the municipality cannot levy any property-tax on the building? Obviously not. Ordinarily a room in a lodge must have the minimum necessities *viz.*, bedding electricity, service etc., though the extra amenities can be charged separately. A room in a lodge is inconceivable without these fundamental amenities of bedding, electricity etc. These charges must be properly classified under rent. What is more, the plaintiff-lodge also collects donations from all the lodgers......"

The view of the lower appellate Court is that the sum collected from the occupants has to be taken as rent. If that is so, then there is no necessity to make a deduction of 50 per cent towards services etc. That shows that even the assessing authority proceeded on the basis that only 50 per cent of the amounts collected can be treated as rent. In my view the Courts below have not gone into the question as to what is the basis on which the 50 per cent. deduction is allowed, and if there is no basis, either statutory or otherwise, the cost of services etc., has actually to be found out and deducted from the total receipts from the rooms. As already stated, the municipality has not furnished any material before the Court to show that the 50 per cent deduction is based on any practice uniformly followed by the municipality in the case of all lodges. Though the report refers to such a practice no document has been produced to prove such a practice. Not even one comparable instance has been given to show that the cost of services etc., will come only to 50 per cent of the aggregate receipts. In the absence of any practice or comparable data, the authorities should have calculated the actual cost of services etc., so as to arrive at the actual rents from the rooms. A rough and ready basis adopted by the municipality deducting the cost of services etc., at 50 per cent of the receipts appears to be somewhat arbitrary. According to the appellant the cost of services will be more than 75 per cent and the assessing authority should have actually worked out the cost of all the services provided for by the appellant or the cost of like services provided for by other running similar lodges before proceeding to calculate the rental value from the building in question. I do not, however, say that the municipality is bound by the nomenclature given by the appellant for the amounts realised, as it is possible for it to camouflage the rental collections by bringing it under various other heads such as services etc. But that will not enable the municipality to fix arbitrarily 50 per cent of the total receipts as rents without actually finding out the cost of such services etc.

The learned Counsel also submits that the authorities below have not kept in mind proviso (*b*) to section 82 (2) which specifically excludes cost of furniture from the rental value of the building and this entirely vitiates the assessment. If the 50 per cent is taken to cover the cost of providing furniture also, then it cannot be said that the assessing authority has not kept in mind the above proviso.

9. The result is, though all the other contentions of the appellant cannot be upheld, the submission that the cost of services etc., had not been properly ascertained and deducted from the gross receipts before the actual rental value is fixed for the building has to be accepted and the enhanced levy has to be set aside. It is however, made clear that it is open to the municipality to collect the levy before the enhancement or to proceed to make a fresh assessment as per law.

10. The second appeal is, therefore, allowed and the decrees and judgments of the Courts below are set aside. There will, however, be no order as to costs. No leave.

P.S.P. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

Navis Ammal Fernando and another .. *Appellants**

v.

S. Subbiah Iyer .. *Respondent.*

Usurious Loans Act (X of 1918), *section* 3 (1) (2) *as amended by Usurious Loans (Madras Amendment) Act (VIII of* 1937) *Tamil Nadu Money-lenders Act (XXVI of* 1957), *section* 7—*Suit on mortgage- Interest* 12 *per cent por annum as per document payable monthly—In default of monthly payment interest to be* 13½ *per cent—Suit for principal and interest—Interest whether usurious—Whether the provisions of Tamil Nadu Act (XXVI of* 1957) *would apply—Retrospective operation of statute—Interpretation of statutes.*

For the purpose of attracting the provisions of section 3 (1) of Central Usurious Loans Act (X of 1918) as amended by the Madras Act VIII of 1937, the condition precedent would be that the Court should have reason to believe that the transaction was, as between the parties thereto substantially unfair. [*Para.* 10.]

In the instant case, the question came up for consideration whether on a mortgage executed on 1st August, 1953, the rate of interest of 12 per cent simple interest per annum and in default of payment of interest every month interest thereafter would be 13½ per cent per annum could be said to be excessive and attract the provisions of the Central Act X of of 1918 as amended by Madras Act VIII of 1937 and also the provisions of section 7 of the Tamil Nadu Money-lenders Act of 1957.

Held, that no hard and fast rule can be laid down either with reference to the percentage of interest or with reference to the nature of interest, whether simple or compound, for the purpose of determining whether the rate of interest charged in a particular case was excessiv or not. As far as th instant case was concerned the rate of interest *per se* could not be said to be excessive. Accordingly the Court could not exercise its powers under section 3 (1) of the Usurious Loans Act, as amended by Madras Act VIII of 1937. [*Para.* 13.]

No statute should be construed so as to have retrospective operation unless its language was such as plainly to require such a construction. At the same time the rule against retrospective effect of a statute was not a rigid or inflexible rule, but was one to be applied always in the light of the language of the statute and the subject-matter with which the statute was dealing. [*Para.* 27.]

There is absolutely nothing in the language of the provisions of the Tamil Nadu Money-lenders Act of 1957 to indicate that any of the provisions of the Act was interded to apply to loans advanced prior to the coming into force of the Act. Section 7 (3) has to be read with sub-section (1) of that section and it covers the same transactions. Section 7 (3) of the Tamil Nadu Act XXVI of 1957 has no application to advances made prior to the commencement of that Act and the interest payable in respect thereof. [*Paras.* 29, 43 *and* 45.]

Cases referred to :—

Nageswara Iyer v. *M.L.M. Ramanathan Chettiar and another*, A.I.R. 1935 Mad. 468 ; *Bwrayada Venkata Rao* v. *Godavarti Venkataratnam and others*, A.I.R. 1952 Mad. 872 : (1952) 2 M.L.J. 60 ; *Sri Balasaraswathi Ltd., Tirunelveli* v. *A. Parameswara Aiyar and another*, A.I.R. 1957 Mad. 122: 69 L.W. 818: (1956) 26 Com. Cas 298 ; *Gopala Menon and another* v. *Sreenivasa Varadachariar and others*, A.I.R. 1960 Mad. 359 : I.L.R. (1960) Mad. 660 : (1960) 2 M.L.J. 81; *T.D. Nichami* v. *State of Madras*, A.I.R. 1964 Mad. 30 : (1963) 1 M.L.J. 202: I.L.R. 1963 Mad. 532 : 76 L.W. 642: *Sajanlal Jhaverilal and Company* v. *Gulabchand Keshrichand*, A.I.R. 1953 Bom. 125; *Bunsilal Ramgapal Bhattad* v. *Harishchandra Tatya Bhambhure*, A.I.R. 1953 Bom. 420.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin in Original Suit No. 76 of 1965.

* A. No. 528 of 1967.

13th September, 1973.

C. S. Rajappa, for Appellant.

R. Shanmugham, for Respondent.

The Judgment of the Court was delivered by

Ismail, J.—The defendant in O.S. No. 76 of 1965 on the file of the Court of the Subordinate Judge of Tuticorin are the appellants herein. The suit was instituted by the respondent for recovery of a sum of Rs. 31,861 due on a mortgage admittedly executed by the first defendant-first appellant in favour of the respondent for Rs. 12,000. The mortgage deed is dated 1st August, 1953 and the same has been marked as Exhibit A-1 in these proceedings. The consideration recited in the document consists of three items, namely, (1) a sum of Rs. 8,600 paid by the respondent for and on behalf of and at the request of the first appellant to the second appellant (second defendant) on 1st May, 1963 by cheque No. 148689 on the Canara Bank issued in favour of the second appellant in discharge of the equitable mortgage in respect of the identical property created by the first appellant in favour of the second appellant for Rs. 8,000; (2) a sum of Rs. 2,305-6-0 being the amount due to the respondent by the first appellant in respect of the monthly auction chit conducted by the respondent and settled at that figure; and (3) a sum of Rs. 1,094-10-0 received as cash from the respondent. The rate of interest stipulated in the mortagage deed was 12 per cent per annum, interest accruing for each month being payable on the 10th of every succeeding month, for which receipt was to be obtained then and there. The principal amount was to be paid in three years' time, that is, on or before the 1st August, 1956 and the mortgage deed got back with the endorsement of discharge. The document further provided that if interest was not paid monthly, the amount of monthly interest due should be added to the principal amount and the whole amount should carry interest at the rate of 13½ per cent per annum and the entire amount of principal and interest due as aforesaid was to be realised in a lump sum whenever the plaintiff wanted, by proceeding against the mortgaged property and also personally. Contending that the first appellant had not paid any amount till date of suit towards the principal and interest due on the mortgage, the respondent instituted the suit. He stated in the plaint that he was satisfied with interest at 12 per cent per annum on the principal sum of Rs. 12,000 from 1st August, 1953 the date of mortgage to 10th September, 1953, when the first month's interest became due and payable and was not paid and thereafter simple interest at 13½ per cent per annum from 11th September, 1953 till date of suit and subsequent interest. The further case of the respondent was that on 27th October, 1965 the second appellant sent a registered letter to the respondent stating that he had purchased the mortgaged property on 22nd October, 1965 from the first appellant, that a sum of Rs. 5,622-50 was reserved in the document of sale for payment in full of the amount due on the suit mortgage, that he was willing to pay the same and that he was not liable for interest thereafter. The respondent contended that the said sale deed was taken by the second appellant in collusion with the first appellant and her husband with ulterior design; that it was not a genuine transaction; that the second appellant knew that the amount as claimed on the suit-mortgage was due; that he was getting a document with false recitals for a lower amount than was actually due; that that itself showed the *mala fides* of the second appellant and that the sale is his favour was not genuine. According to the respondent, the offer by the second appellant of the said amount in full discharge of the suit mortgage debt was *mala fide* and it was promptly rejected by the respondent, since nothing was paid either towards the principal or towards interest due to the respondent under the mortgage deed, Exhibit A-1.

2. The suit was resisted by the appellants herein. The first appellant-first defendant denied that the mortgage was supported by consideration to the extent of Rs. 12,000. She admitted that the mortgage was supported by consideration to the extent of Rs. 8,600, the amount which was paid by the respondent to the second appellant towards discharge of the equitable mortgage admittedly created by the first appellant in favour of the second appellant. In effect, the first appellant denied the other two items of consideration. The further case of

the first appellant was that she had made payments to the respondent and that the amount due under the mortgage was only a sum of Rs. 5,622-50 which was reserved with the second appellant for payment to the respondent, when the property was sold by the first appellant in favour of the second appellant. The substance of the written statement of the second appellant was also the same. In addition to putting forward the above contentions, on merits, they further contended that the rate of interest provided for in the mortgage deed was penal and usurious and that the first appellant was entitled to claim the benefits of the Madras Agriculturists Relief Act (IV of 1938) and that the interest was liable to be scaled down under the provisions of the Usurious Loans Act (Central Act X of 1918) as well as the Madras Money-lenders Act, 1957.

3. On these pleadings of the parties, the trial Court settled the following issues for trial:

1. Whether the suit bond is supported by consideration to the extent of Rs. 8,600 only and the other items of consideration mentioned in the bond are not true ?

2. Whether the several payments alleged in discharge of suit bond are true ?

3. Whether the provision as to interest is either penal or usurious and not claimable under the Madras Money-lenders Act ?

4. Whether the first defendant is entitled to claim the benefits of the Madras Act IV of 1938 ?

5. Whether the first defendant is disentitled in any event to raise such a plea, as she has parted with all her interest in the property in favour of the 2nd defendant who is an income-tax assessee ?

6. Whether the defendants are estopped from contending that the suit mortgage bond is not fully supported by consideration ?

7. Whether the plaintiff is entitled to compensatory costs ?

8. Whether the tender pleaded by the 2nd defendant is true and valid ?

9. To what relief, the plaintiff is entitled ?

4. On an elaborate examination of the materials placed before the Court, the learned Principal Subordinate Judge of Tuticorin came to the conclusion that Exhibit A-1 mortgage was fully supported by consideration to the entire extent of Rs. 12,000 and that the payments alleged to have been made by the first defendant-first appellant had not been established. On this finding, he answered issue No. 1 in the affirmative and in favour of the plaintiff-respondent and issue No. 6 in the negative, and against the appellants. He answered issue No. 2 also in the negative, and against the appellants. On issues Nos. 4 and 5, he held against the appellants on his finding that the mortgaged property is situated within the limits of the Tuticorin Municipality and that in any event the first appellant had sold the property to the second appellant, who is admittedly an income-tax assessee. On issue No. 3, he held that the mortgage debt in question and the rate of interest stipulated in the mortgage deed, Exhibit A-1, were not liable to be reopened under section 3 (1) of the Usurious Loans Act (Central Act X of 1918) as amended by Madras Act VIII of 1937 and that the Madras Money-lenders Act, 1957, not having retrospective effect, did not affect the rate of interest provided in Exhibit A-1, the mortgage-deed, which admittedly came into existence prior to the coming into force of the said Act, and consequently he answered that issue against the appellants. On issue No. 8, the conclusion of the learned Subordinate Judge was that, since he found under issue No. 2 that the several payments pleaded by the first appellant were not true, the tender pleaded by the second appellant, although true, was not valid in the sense that it was not purported to be in full discharge of the liability under the suit mortgage. On issue No. 7, he held that the plaintiff was not entitled to compensatory costs. On these findings, by his judgment and decree dated 24th October, 1966, the learned Principal Subordinate Judge decreed the suit as prayed for and passed the necessary preliminary decree and granted three months' time to the appellants for payment.

5. It is against this decree and judgment that the present appeal has been preferred by the defendant in the suit. Since the defendants contended that only

a sum of Rs. 5,622-50 was due under the mortgage, admitting the liability for that amount and interest, they have filed this appeal for the balance of the amount decreed against them.

6. Mr. V. Ratnam, learned Counsel for the appellants, having regard to the voluminous evidence available in the case and having regard to the thoroughness with which all pieces of evidence have been considered and discussed by the trial Court, did not, in our opinion, very rightly canvass the correctness of the findings of the trial Court that Exhibit A-1 mortgage was supported by consideration to the entire extent of Rs. 12,000 and that the payments made by the first appellant were not true, with the result he concentrated his attack on the decree passed by the trial Court with reference to only two points considered and rejected by the trial Court, they being the reliance on the provisions of the Usurious Loans Act (Central Act X of 1918) as amended by the Usurious Loans (Madras Amendment) Act, 1936 (Madras Act VIII of 1937) and the Madras Money-lenders Act, 1957 and consequently we proceed to consider only those two points in this appeal.

7. As far as the first point regarding the Usurious Loans Act (Central Act X of 1918) is concerned, section 3 (1) of that Act provides that where in any suit to which that Act applied, the Court has reason to believe: (*a*) that the interest is excessive; and (*b*) that the transaction was, as between the parties thereto substantially unfair, the Court may exercise all or any of the following powers, namely: may (*i*) reopen the transaction, take an account between the parties and relieve the debtor of all liability in respect of any excessive interest; (*ii*) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof; (*iii*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just. Clause (*a*) of sub-section (2) of section 3 states as to when interest can be said to be excessive and clause (*b*) of this sub-section states, what should be taken into account by the Court in considering the question whether the interest is excessive or not. Clause (*c*) of this sub-section further provides as to what the Court shall take into account in considering the question of risk and clause (*d*) provides as to what the Court shall take into account in considering whether a transaction was substantially unfair or not. It will be seen that the conditions precedent for the exercise of the power by the Court pursuant to this section are that the Court must have reason to believe that the interest is excessive and that the transaction was, as between the parties thereto, substantially unfair. It is relevant to notice that these two conditions must be cumulatively satisfied.

8. A Bench of this Court had to consider the scope of the above provisions in *Nageswara Ayyar* v. *M. L. M. Ramanathan Chettiar and another*[1]. This Court pointed out that the Usurious Loans Act was introduced for the purpose of giving the Court larger powers than those given by section 16, Contract Act, in dealing with matters relating to the rate of interest in cases of loans and that before a debtor can claim relief under the Usurious Loans Act, the two conditions referred to above must be satisfied. The Bench held that the provisions of sub-clause (*a*) of clause (2) of section 3 of the Usurious Loans Act imposed upon the Court the duty of coming to a conclusion as to what would be a reasonable rate of interest, having regard to the risk incurred, and that for a transaction to be regarded as unfair within the meaning of clause (*d*) of sub-section (2) of section 3, it is not necessary that the Court should be able to ascribe some moral blameworthiness to the creditor in the sense that he had tricked the debtor into entering into that bargain, though the terms of clause (*d*) showed that taking undue advantage of the position of the debtor was one category of cases

1. A.I.R. 1935 Mad. 468.

falling under that clause. The Bench further held in that case that it was also open to the Court to come to the conclusion that the transaction was substantially unfair by taking into account the circumstances materially affecting the parties at the time of the loan.

9. This Act has been amended, as far as the State of Tamil Nadu is concerned, by the Usurious Loans (Madras Amendment) Act, 1936 (Madras Act VIII of 1937) and section 3 (1) and (2) of the Central Act of 1918 as amended by the Madras Act VIII of 1937 reads as follows:

"3 (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855 (XXVIII of 1855), where in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe that the transaction was, as between the parties thereto, substantially unfair, the Court shall exercise one or more of the following powers namely:

(*i*) reopen the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(*ii*) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(*iii*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not—

(*i*) reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years from the date of the transaction;

(*ii*) do anything which affects any decree of a Court.

Explanation I.—If the interest is excessive the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest.

Explanation II.—In the case of a suit brought on a series of transactions the expression 'the transaction' means, for the purposes of proviso (*i*), the first of such transactions.

(2) (*a*) In this section 'excessive' means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared or must be taken to have appeared, to the creditor at the date of the loan.

(*b*) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction :

Provided that in the case of loans to tourists, if compound interest is charged, the Court shall presume that the interest is excessive.

(*c*) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(*d*) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of

the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor".

The effect of the amendment made by the Madras Act is as follows:

(1) Instead of two conditions precedent cumulatively being satisfied, the only condition that has to be satisfied to enable a Court to exercise power under section 3 is that the Court must have reasons to believe that the transaction as between the parties thereto was substantially unfair.

(2) In relation to the exercise of the power by a Court, instead of the word, "may", the word, "shall" has been substituted.

(3) A new *Explanation* as *Explanation I* extracted above has been introduced. The effect of this amendment is that if a Court considers the interest as excessive, it must presume that the transaction was substantially unfair, though the said presumption is rebuttable.

(4) In the case of loans to agriculturists, if compound interest is charged, the Court is bound to presume that the interest is excessive.

(5) *Explanation* to clause (*d*) of sub-section (2) of section 3 is omitted. The *Explanation*, as it stood, was:

"Interest may of itself be sufficient evidence that the transaction was substantially unfair".

10. As far as the present case is concerned, we have already referred to the finding of the trial Court that the mortgaged property is a house situate within the limits of the Tuticorin Municipality and that the second appellant is an income-tax assessee. Therefore, the provisions of Madras Act IV of 1938 are not applicable to the appellants herein. Independent of the provisions of Madras Act IV of 1938, no other claim was put forward that the appellants were agriculturists so as to attract the applicability of the proviso to section 2 (*b*) of the Central Act X of 1918 as amended by the Madras Act VIII of 1937. Consequently, we are left only with the main part of section 3 (1) of the Central Act X of 1918 as amended by the Madras Act VIII of 1937 on which alone reliance appears to have been placed before the trial Court. For the purpose of attracting that statutory provision, the condition precedent is that the Court must have reason to believe that the transaction was, as between the parties thereto, substantially unfair. In this case, there is absolutely nothing to show that as between the parties thereto, Exhibit A-1 mortgage was unfair, much less substantially unfair. Before the trial Court, reliance had been placed on a decision of this Court in *Buragada Venkatarao and another* v. *Godavarti Venkataratnam and others*[1]. That decision considered the effect of the amendment made to the Central Act X of 1918 by the Madras Act VIII of 1937 and pointed out that the same was to make it obligatory on the Court to find out whether there was excessive interest and when once that was done, to presume that the transaction was unfair. That decision, in our opinion, does not lay down any general principle which is capable of helping the contention of the appellants in this particular case. In that case a question arose whether the rate of Rs. 1-0-6 per month, compound interest, with annual rests was excessive in the circumstances of the case. It was observed that in a case where a mortgagor gives ample security for the loan and there were no encumbrances or other claimants to the mortgaged property, *prima facie* and in the absence of special circumstances to the contrary, the rate of 12 per cent. per annum, simple interest, might be taken as a fair and proper rate and Rs. 1-0-6 per cent. per mensem, compound interest with annual rests was excessive, within the meaning of the *Explanation* inserted by the Madras Act VIII of 1937 and that therefore the transaction between the parties thereto was unfair and that the debtors in that case were entitled to the benefit of the Usurious Loans Act, as amended by the Madras Act VIII of 1937, and that 12 per cent. simple interest was fair, reasonable and just. In this particular case, as we have pointed out already, originally the rate of interest was only 12 per cent. per annum and only if default was committed in the payment of monthly interest, that interest was to be added to

1. (1952) 2 M.L.J. 60: A.I.R. 1952 Mad.872.

the principal and interest at 13½ per cent. per annum was to be charged. We do not consider that this interest is excessive, with reference to the *Explanation* inserted by the Madras Act VIII of 1937 so as to give rise to the presumption of the transaction being substantially unfair as between the parties. Therefore, the said decision, in our opinion, is not of any assistance to the case of the appellants herein with reference to the provisions of the Central Act X of 1918 as amended by the Madras Act VIII of 1937.

11. We may also point out that in that decision, the Bench has observed:

> "We are also of opinion that in the Madras State it has been long understood that 12 per cent. simple interest is a fair, proper and reasonable rate..
>
> ....
>
> We have already expressed the opinion that anything above 12 per cent. per annum simple interest is excessive, considering the nature of transactions in this State".

This observation of the Bench came up for consideration before another Bench of this Court in *Sri Balasaraswathi Ltd., Tirunelveli* v. *A. Parameswara Aiyer and another*[1]. After referring to the various earlier decisions including the decision of the Bench of this Court referred to already, the Bench held:

> "No absolute maximum rate of interest, beyond which it will automatically become usurious or unconscionable, can be laid down, even after the coming into operation of the Constitution of India. Courts will have to see the circumstances of each case, and judge whether the rates in those circumstances will be penal, usurious and unconscionable.
>
> Of course, there may be some cases where the rate is so excessive that there may be a conclusive presumption that it is penal, usurious or unconscionable, as where the rate is 100 per cent. per annum, or it is compound interest at even 10 per cent. per annum with daily rests...........
>
> It cannot be said that compound interest, without more, by itself will be presumed to be penal, usurious and unconscionable, either regarding secured or unsecured debts, even after the coming into operation of the Constitution of India. It is obvious that three per cent. compound interest, with yearly rests for a loan enuring for three or four years, will be more advantageous to the borrower than 12 per cent. simple interest.
>
> ....
>
> Where there is no security, and the principal and interest are in danger, and the borrower cannot get in the money market any loan even at 12 per cent. simple interest, a Court can allow something more than 12 per cent. simple interest per annum..........
>
> ......Even in the borrower's interest, a slightly higher rate than 12 per cent. per annum should be allowed by Courts in such cases, as otherwise the borrowers may get no loan whatever from anyone and may not be able to start any trade or business and eke out their living.
>
> ....
>
> It is often the case that a man with no resources has yet the ability to buy goods in the market and sell them within a few days at 20 to 25 per cent. profit which he cannot make unless he gets a loan and nobody will give him a loan even at 12 per cent. simple interest. In such a case it will be profitable for him to pay a little more interest, say even upto 18¾ per cent. per annum.
>
> Many a man buys vegetables in the shandis with money borrowed at 18¾ per cent. per annum and sells them within 24 to 48 hours at a profit of 20 to 25 per cent. It cannot be said that in such cases interest of even 18¾ per cent. per annum (charged in the country parts even today on loans to impecunious creditors (sic) will be penal and usurious or unconseionable, as he gets a good balance as profit for himself after paying such interest.
>
> While we cannot, therefore, agree with Mr. Venkatasubramania Aiyar that simply because the borrower gets high profits by investing the loan in business he can be made to pay 15 or 18 per cent. compound interest, much less 50 to 75

1. 69 L.W. 818 : (1956) 26 com. cas. 298 : A.I.R. 1957 Mad. 122.

per cent. simple interest, as held in the old cases, we are of opinion that 12½ per cent. to 18¾ per cent. simple interest or 2 or 3 pies per rupee per month, may be quite reasonable in such cases."

Thus, the Bench in that case did not construe the decision of this Court in *Buragada Venkatarao and another* v. *Godavarti Venkataratnam and others*[1], as holding that 12 per cent. simple interest was the only reasonable rate of interest in the State.

12. The same view was taken by another Bench of this Court in *Gopala Menon and another* v. *Sreenivasa Varadachariar and others*[2]. After referring to the decision in *Buragada Venkatarao and another* v. *Godavarti Venkataratnam and others*[1], the Bench pointed out:

> "We do not, however, understand the effect of this decision to be to lay down an inflexible rule that anything above 12 per cent. per annum simple interest is excessive, whatever be the particular circumstances relating to a particular transaction of loan....
>
> ....We are clearly of opinion that to lay down an absolute maximum rate of interest beyond which interest would be excessive within the meaning of the Usurious Loans Act would be in direct contravention of what is laid down in the Act itself.
>
> Section 3 (2) (*a*), (*b*) and (*c*) of the Usurious Loans Act which continues to be applicable notwithstanding the Madras Amendment makes it abundantly clear that in deciding whether the interest charged is excessive several factors have to be taken into consideration.
>
> One important fact will be the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan. In considering the question of risk section 3 (2) (*c*) enacts that it will be material to take into account the presence or absence of security and the value thereof, and the financial condition of the debtor and the result of any previous loan transactions known to the creditor. If compound interest is charged, the periods at which it is calculated and the total advantage which may be reasonably expected to have accrued from the transaction are important factors."

13. Thus, in our opinion, no hard and fast rule can be laid down either with reference to the percentage of interest or with reference to the nature of interest, whether simple or compound, for the purpose of coming to the conclusion whether the rate of interest charged in a particular case is excessive or not. As far as the present case is concerned, we have already pointed out that the rate of interest originally stipulated was only 12 per cent. simple interest per annum and only if default was committed with regard to the payment of interest every month, the document provided that it must be added to the principal and the interest thereafter would be at 13½ per cent. per annum. Consequently, the above rate of interest *per se* cannot be said to be excessive. Further, no particular circumstance was brought to our notice to compel us to hold that either the rate of interest so provided was excessive having regard to the facts of the case or that the transaction was substantially unfair as between the parties thereto, in view of any particular facts. Hence, agreeing with the trial Court, we hold that the appellants have not made out any case for the Court exercising its powers under section 3 (1) of the Usurious Loans Act, as amended by Madras Act VIII of 1937.

14. The next point for consideration is, whether the appellants are entitled to any relief under the provisions of the Tamil Nadu Money Lenders Act, 1957, hereinafter referred to as the Tamil Nadu Act. As the preamble itself states, the Act was enacted to regulate and control the business of money-lenders in the State of Tamil Nadu. Sub-section (3) of section 1, provides that the Act shall come into force in any area on such date as the Government may by notification specify and the Act was brought into force on 16th October, 1959. Section 2 of the Act defines the various terms used in the Act including the term, "loan". That expression excludes among others from the scope of the Act the following, namely: (1) a deposit of money or other

1. (1952) 2 M.L.J. 60: A.I.R. 1952 Mad. 872.
2. I.L.R. (1960) Mad. 660 : (1960) 2 M.L.J. 81 : A.I.R. 1960 Mad. 359.

property in a Government Post Office Savings Bank or in a Bank, in a company as defined in the Companies Act, 1956 or with a co-operative society; (2) an advance made by a Bank or a co-operative society or an advance made from a provident fund to which the Provident Funds Act, 1925 applies; (3) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, exceeding Rs. 3,000. The expression, "money-lender" is defined as a person whose main or subsidiary occupation is the business of advancing and realizing loans, but it excludes a Bank or a co-operative society.

15. Section 3 (1) of the Act provides that no person shall, on and after the date on which the provision of this Act are brought into force in any area, carry on, or continue to carry on business as a money-lender at any place in such area, except under and in accordance with the terms of a licence. Section 4 deals with the grounds on which and the circumstances under which licences so applied for shall be granted or refused and the period of validity of licence. It also deals with appeals against orders refusing to grant licence. Section 5 imposes an obligation on a money-lender not to change his place of business without previous notice to the licensing authority and without having the address of the new place of business duly endorsed on the licence. Section 6 requires that every money-lender shall always keep exhibited over his shop or place of business his name with the word, "money-lender" and its equivalent in the regional language.

16. Section 7, which has three sub-sections, is as follows:—

"7 (1) No money-lender shall charge interest on any loan, at a rate exceeding nine per cent. per annum, simple interest, where the loan is a secured loan, or at a rate exceeding twelve per cent. per annum, simple interest, where the loan is not a secured loan.

(2) A money-lender may demand and take from the debtor such charges and in such cases, as may be prescribed.

(3) A money-lender shall not demand or take from the debtor any interest, profit or other sum whatsoever in excess of that payable under sub-section (1)".

Section 8 (1) provides that where a money-lender refuses to accept the whole or any portion of the money or other property due in respect of his loan, the debtor may deposit the said money or property into the Court having jurisdiction to entertain a suit for recovery of such loan and apply to the Court to record full or part-satisfaction of the loan, as the case may be and sub-section (2) of section 8 provides that where any such application is made, the Court shall, after due inquiry, pass orders recording full or part-satisfaction of the loan, as the case may be.

17. Section 9 requires that every money-lender shall regularly record and maintain or cause to be recorded and maintained, an account showing for each debtor separately: (1) the date of the loan, the amount of the principal o the loan, the rate of interest charged on the loan, and the nature of security taken, if any; and (2) the amount of every payment received by the money-lender in respect of the loan, and the date of such payment. The same section imposes an obligation on every money-lender to give to the debtor or his agent, a receipt for every amount paid by him, duly signed and, if necessary, stamped at the time of such payment; and on requisition in writing made by the debtor to furnish to him, or if he so requires, to any person mentioned by him in that behalf, a statement of account signed by himself or his agent, showing the particulars referred to already and also the amount which remains outstanding on account of the principal and of interest and charge such fee therefor as the Government may prescribe. The same section further imposes an obligation on every money-lender to submit such returns relating to the loans advanced by him to the Inspector concerned, in such form and at such times as may be prescribed. Sub-section (2) of this section requires that all records or entries made in the books, accounts and documents referred to in sub-section (1) shall be in such language as may be prescribed in respect of any area. Sub-section (6) of this section states that if any money-lender fails to give a receipt as required by clause (*b*) of sub-section (1) or to furnish on a requisition, a statement

of account as required by the said sub-section within one month after such requisition has been made, he shall not be entitled to any interest for the period of his default.

18. Section 10 enables the Government or any authority or officer empowered by them, to appoint one or more persons to be Inspectors for the purposes of this Act and deals with the powers of the Inspectors.

19. Section 11 (1) states:

"Any money-lender whether licensed or not

(*a*) who actually advances an amount less than the amount shown in his accounts or registers or other document relating to the loan; or

(*b*) who takes or receives interest or any other charge at a rate higher than the rate shown in the accounts, registers or document aforesaid or allowed under this Act shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both."

20. Section 12 deals with cognizance of offences under the Act and section 13 provides for penalty for molestation of a debtor.

21. Section 14 enables the licensing authority to cancel a licence already granted under the circumstances mentioned therein. Section 15 provides for publication of the order of cancellation and section 16 provides that no compensation will be payable in respect of cancellation of licence.

22. Section 17 states that whoever carries on the business of money-lending without a licence or otherwise than in conformity with the terms and conditions of a licence shall be punished with fine which may extend to Rs. 1,000, provided that a person shall not be deemed to carry on the business of money-lending without a licence, if he had ceased to carry on the business of money-lending but was taking steps to recover any loan advanced by him.

23. Section 18 provides for penalties to be imposed for contravention of any of the provisions of the Act or any rule made thereunder or of any terms or conditions of a licence granted or deemed to be granted thereunder and it also states that whoever makes a claim or a statement which is false or which he does not believe it to be true shall also be liable to the penalty.

24. Section 19 deals with transfer of licence in the event of the death of the licensee. Section 20 is concerned with the jurisdiction of the Courts to try offences under this Act and section 21 provides that where a money-lender is guilty of an offence punishable under this Act any contract made by him in relation to his business of money-lending shall not be void by reason only of that offence, nor shall he, by reason only of that offence lose his right to the loan and the interest and other charges, if any, payable in respect thereof.

25. Section 22 is the rule-making section.

26. The constitutional validity of this Act came to be considered by a Bench of this Court in *T.D. Nichani and another* v. *State of Madras, represented by its Secretary, Department of Industries, Labour and Co-operation*[1]. In that judgment, this Court has elaborately referred to the circumstances under which the Tamil Nadu Act came to be passed.

27. As far as the present case is concerned the question for consideration is, whether the appellants herein are entitled to the benefit of the provisions of the Tamil Nadu Act. Reliance has been placed on the provisions of this Act only because the respondent during the course of his evidence has admitted that he is a professional money-lender. In view of this statement of the respondent, the case of the appellants is that once the respondent has admitted that he is a professional money-lender, he is a money-lender as defined in the Tamil Nadu Act and consequently the restriction regarding the rate of interest is applicable to the suit transaction. It must be noticed that the mortgage in this case was executed on 1st August, 1953, that is, prior to the coming into force of this Act. Therefore, the question for consideration is, whether the provisions of section 7 of this Act, on which

1. (1963) 1 M.L.J. 202 : I.L.R. (1963) Mad. 532 : 76 L.W. 642 ; A.I.R. 1964 Mad. 30.

alone reliance has been placed, applies to the suit transaction. The trial Court has held that there is nothing in the language of the Tamil Nadu Act to make the Act retrospective in operation and consequently, the provisions of this Act do not apply to the suit transaction which was entered into prior to its coming into force. Mr. V. Ratnam, learned Counsel for the appellants, contended that the trial Court erred in this conclusion of its and even if sub-section (1) of section 7 of the Tamil Nadu Act does not apply, sub-section (3) of section 7 will apply to this case. We have extracted section 7 in full already. Sub-section (1) of section 7 prohibits a money-lender from charging interest on any loan at a rate exceeding 9 per cent. per annum, simple interest, where the loan is a secured one or at a rate exceeding 12 per cent. per annum, simple interest, where the loan is not a secured one. Mr. V. Ratnam concedes that the expression, "charge interest" will refer to the stage of stipulating interest, that is, in the present case, at the time when the suit mortgage was executed on 1st August, 1953 and therefore sub-section (1) will not apply to the present case, but contends that the language of sub-section (3) is more general and deals with the stage of even demanding or taking and consequently after the coming into force of the Tamil Nadu Act, the respondent herein can neither demand nor take interest at a rate in excess of 9 per cent. as provided for in sub-section (1), since the loan in question is a secured loan. We have given careful consideration to this argument of the learned Counsel for the appellants. But we are not able to accept the same. It is true that it may not be correct to say that to accept the argument of the learned Counsel for the appellants is to give retrospective effect to the provisions of the Tamil Nadu Act. It is one thing to say that a particular statute is retrospective. It is another thing to say that a particular statute, though prospective in operation, relates to acts or events which are of the past. As pointed out by Craies on Statute Law, Seventh Edition, page 387.

> "A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. But a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing'."

It is a settled and fundamental rule that no statute should be construed so as to have retrospective operation unless its language is such as plainly to require such a construction. At the same time, it should not be forgotten that the rule against retrospective effect of a statute is not a rigid or inflexible rule, but is one to be applied always in the light of the language of the statute and the subject-matter with which the statute is dealing.

28. As pointed out by Maxwell on the Interpretation of Statutes, Twelfth Edition page 218:

> "The rule discussion (relating to retrospective operation) has been applied chiefly in cases in which the statute in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of past transactions, or would impair contracts, or would impose new duties or attach new disabilities in respect of past transactions."

Yet another rule of construction in this behalf is:

> "If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." (Craies on Statute Law-Seventh Edition, page 390).

29. It is against the background of these general principles, we have to consider the question whether sub-section (3) of section 7 of the Tamil Nadu Act applies to the present case so as to compel us to hold that even though at the time when Exhibit A-1 mortgage came into existence, there was no law prohibiting the stipulation of interest at 12 per cent. per annum or 13½ per cent. per annum and consequently the respondent was entitled to claim the rate of interest as agreed to between the parties, still after the coming into force of the Tamil Nadu Act, the respondent can demand and take only 9 per cent. per annum simple interest as provided for in sub-section (1) of section 7, as the loan in the present case is a

secured loan. If sub-section (3) is merely consequential upon sub-section (1), there no dispute that sub-section (3), has no application to the present case, because sub-section (1) deals only with transactions entered into after the coming into force of the Tamil Nadu Act and therefore sub-section (3) also will apply only to such transactions. The argument of the learned Counsel for the appellants will prevail only if we hold that sub-section (3) is indeoendent of sub-section (1) and that while sub-section (1), deals with loans advanced subsequent to the coming into force of the Act, sub-section (3) covers loans advanced even prior to the coming into force of the Act. For more reasons than one, we are unable to hold that sub-section (3) of section 7 is an independent provision and consequently it applies to all loans irrespective of whether the loan was advanced prior to the coming into force of the Act or subsequent to the Act, because of the wide language "demand or take" used in the said sub-section. In the first place, we have already referred to the provisions of the Tamil Nadu Act and there is absolutely nothing in the language of the provisions of the Act to indicate that any of the provisions of the Act is intended to apply to loans advanced prior to the coming into force of the Act.

30. In this context, it may be useful to refer to the enactments of a similar nature passed by the various State Legislatures in this country.

31. The Assam Money-lenders Act, 1934 as amended by Act VI of 1943, in section 4 thereof provides that any contract made before or after the commencement of that Act for the loan of money by a money-lender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract. Section 7 (1) of that Act states that in respect of every contract for the repayment of a loan made by a money-lender, whether made before or after the commencement of that Act, the money-lender shall, on demand in writing being made by the borrower at the time of executing the contract or at any time during the continuance of the contract, supply to the borrower, or, if the borrower so requires, to any person specified in that behalf in the demand, a statement signed by the money-lender or his agent showing the particulars mentioned in that section. Similarly section 9 of that Act provides that no money-lender shall, in respect of any loan made before or after the commencement of that Act, recover, on account of interest and principal, whether through Court or otherwise or by way of usufruct of lands in usufructuary mortgages, a sum greater in aggregate than double the principal of the loan.

32. The Bihar Legislature passed the Bihar Money-lenders Act, 1938. Section 7 of that Act dealing with the duties of registered money-lenders to maintain accounts and to give receipts, expressly provides that every registered money-lender shall, in respect of every loan advanced by him after the commencement of that Act and every transaction made by him after the commencement of that Act relating to any loan advanced by him before the commencement of that Act, regularly record and maintain an accounts.

33. Section 5 of the Bihar Money-lender, (Regulation of Transactions) Act, 1939 fixes the maximum rate of interest at 9 per cent. per annum in the case of secured loans and at 12 per cent. per annum in the case of unsecured loans and expressly states that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced after the commencement of the Act, pass a decree for interest at rates exceeding the rates mentioned above. Section 6 of that Act similarly provides that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, an agreement entered into by a debtor for the payment of compound interest on loans advanced after the commencement of the Act shall be void. Section 7 of that Act provides that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement no Court shall, in any suit brought by a money-lender before or after the commencement of the Act in respect of a

loan advanced before or after the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such a document. Section 8 of that Act expressly provides for the reopening of the past transactions and clearly refers to the loans advanced before the commencement of that Act. Similarly section 10 deals with suits instituted before or after the commencement of the Act.

34. Section 23 of the Bombay Money-lenders Act, 1946, provides that notwithstanding anything contained in any agreement or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the date on which the Act came into force, decree, on account of interest a sum greater than the principal of the loan due on the date of the decree.

35. Section 9 of the Central Provinces and Berar Money-lenders Act, 1934, provides that notwithstanding anything contained in any other enactment for the time being in force, no Court, original or appellate, shall decree, in respect of any loan made after the Act came into force, decree, on account of arrears of interest a sum greater than the principal of the loan.

36. Section 9 of the Orissa Money-lenders Act, 1939, provides that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in respect of a loan advanced after the commencement of the Act, pass a decree for interest at rates exceeding 9 per centum simple per annum in the case of a secured loan and 12 per centum simple per annum in the case of an unsecured loan. Section 10 of that Act provides that notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit whether brought by a money-lender or by any other person in respect of a loan advanced before or after the commencement of the Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise is greater than the amount of the loan originally advanced.

37. Section 30 of the Bengal Money-lenders Act, 1940, is as follows:

"30. Notwithstanding anything contained in any law for the time being in force, or in any agreement—

(1) no borrower shall be liable to pay after the commencement of this Act—

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan;

(b) on account of interest outstanding on the date upto which such liability, is computed, a sum greater than the principal outstanding on such date;

(c) interest at a rate per annum exceeding in the case of—

(i) unsecured loans, ten per centum simple;

(ii) secured loans, eight per centum simple;

whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act;

(2) no borrower shall after the commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates per annum exceeding those specified in sub-clause (c) of clause (1);

(3) a lender shall be entitled to institute a suit at any time after the commencement of this Act in respect of a transaction to which either or both of the preceding clauses applies or apply."

Section 38 of that Act enables a borrower to make an application at any time to a

Court which would have jurisdiction to entertain a suit by the lender for the recovery of the principal and interest of a loan made before or after the commencement of the Act for taking accounts and for declaring the amount due to the lender.

38. Under section 9 of the Mysore Money-lender Act, 1939, every money-lender shall in respect of every loan advanced by him after the commencement of the Act and every transaction made by him after the commencement of the Act relating to any loan advanced by him before the commencement of the Act, regularly record and maintain or cause to be recorded and maintained an account in such form, language, script and numerals as the Government may prescribe. Section 14 of that Act provides that notwithstanding anything contained in any law for the time being in force, no Court shall in any suit brought in respect of a loan advanced after the commencement of the Act, pass a decree for interest at rates exceeding 9 per centum per annum in the case of a secured loan and 12 per centum per annum in the case of an unsecured loan. According to section 15 of that Act, no money-lender shall recover by suit interest of any kind at a rate exceeding 6 per centum per annum with yearly interest (sic.) in respect of any loan made after the commencement of the Act under a contract which provides for the payment of compound interest. Section 17 of that Act provides that no Court shall, in respect of a loan advanced before or after the commencement of the Act, decree on account of arrears of interest, a sum greater than the principal of the original loan.

39. Without attempting to be exhaustive we have referred to certain enactments of the State Legislatures that were in force in the different States of the country at the time when the Tamil Nadu Act was passed. The provisions of the said Acts referred to already clearly show that those Acts, whenever they intended to deal with a loan advanced before the commencement of the said Acts, had expressly mentioned the same. There are certain provisions like application of the principle of damdupt which are made applicable to all loans, whether advanced before or after the commencement of the Act. They also make provisions for the reopening of the past transactions and for the Court giving directions for payment of the amount in instalments with regard to decrees already passed. However, in the entirety of the Tamil Nadu Act, there is not a single expression showing that the intention of the said Act was to apply any particular provision to any loan advanced prior to the commencement of the Act. One of the formula generally adopted by Legislatures to make the provisions of an Act to override the contract between the parties is, to expressly say so, and this is what Craies on Statute Law, 7th Edn. at page 256 points out:—

> "It is not uncommon now-a-days for statutes to make their provisions applicable notwithstanding any agreement to the contrary, or to forbid contracting out except under conditions prescribed in the statute."

As far as the Tamil Nadu Act under consideration is concerned, in addition to there being no words indicating an intention on the part of the Legislature that any of the provisions of the Act was to apply to a loan advanced before the commencement of the Act, even such a formula is absent. We have referred to the provisions contained in some of the enactments of the State Legislatures on the same subject, not for deriving any assistance for construing the Tamil Nadu Act in question, but merely for the purpose of showing that at the time when the Tamil Nadu Act was passed, those Acts were on the statute book and they had used a different language whenever they intended to deal with a loan advanced prior to the commencement of the Act. Consequently, even a comparison of the language of the Tamil Nadu Act with the language of the provisions contained in those Acts will clearly show that the provisions of the Tamil Nadu Act and in particular section 7 (3) were not intended to apply and do not apply to loans advanced prior to the commencement of the said Act.

40. We shall refer to some of the practical considerations also which will lead to the same conclusion. As we have pointed out already, the Tamil Nadu Act has no application to advances made on the basis of negotiable instruments, as defined in

the Negotiable Instruments Act, 1881, exceeding Rs. 3,000. With reference to this provision, a Bench of this Court in *J. D. Nichami and another* v. *State of Madras, represented by its Secretary, Department of Industries, Labour and Co-operation*[1], referred to already, stated that the underlying idea was that persons who borrow such large amounts of Rs. 3,000 and above on executing negotiable instruments can well take care of themselves and that the protection afforded by the Act would not be necessary as it is essentially one for the protection of the impecunious and helpless borrowers. The Bench further observed:

> "The materials now available show that the evil of the money-lenders' exploitation was with reference to lower middle class people, particularly, the salaried servants and wage-earners."

The Act also does not cover an advance made by a bank or a co-operative society, as such bank or co-operative society does not come within the definition of the term, "money-lender". A money-lender might have borrowed money either on the basis of a negotiable instrument exceeding Rs. 3,000 or from a Bank or co-operative society, agreeing to pay a particular rate of interest and then in his turn might have advanced the amount by way of loan in the course of his occupation, stipulating a particular rate of interest which would leave him a decent margin of profit. If we hold that section 7 (3) of the Tamil Nadu applies to loans advanced by such a money-lender and consequently he could receive interest only at the rate prescribed by the statute, that might seriously affect his occupation itself, since his borrowing itself is left unaffected and the rate of interest which he has to pay to his lender remains the same, as agreed upon. Such a consequence would not have been, intended by the Legislature. Therefore without there being definite words to that effect, we cannot hold that the sub-section in question was intended to apply to loans advanced prior to the commencement of the Act.

41. Yet another consideration may also be borne in mind in this connection. Section 7 (3) prohibits demanding or taking from a debtor interest in excess of that payable under sub-section (1). Under clause (*b*) of section 11 (1), a person who takes or receives interest at a rate higher than the rate allowed under the Act shall be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both. The point to be noticed is that even a demand or taking interest in excess of the rate prescribed by sub-section (1) of section 7 is made applicable. Suppose in a particular case, a trader had borrowed money from a money-lender for the purpose of utilising the same in his trade and he had agreed to pay a particular rate of interest, say, for instance, 15 per cent. per annum, in the hope and belief that he would be making a profit of 30 per centoin his trade and consequently as a result of his making the expected profit, he promptly and voluntarily pays the agreed interest to the money-lender in question. If the contention of the learned Counsel for the appellants is accepted, the consequence is, the prohibition provided for in sub-section (3) of section 7 will be immediately attracted and the money-lender will be liable to be punished under section 11 (1) (*b*) of the Tamil Nadu Act. In our opinion, that could not have been the intention of the Legislature.

42. We may also refer to yet another consideration. If sub-section (3) of section 7 is said to apply to loans advanced even prior to the commencement of the Tamil Nadu Act, a question will arise, whether it covers the interest that accrued subsequent to the commencement of the Act or it covers also the interest that accrued prior to the commencement of the Act, but remaining unpaid on the commencement of the Act. The expression, "demand or take" is so wide as to be capable of being applied to both. There is absolutely nothing in that sub-section to limit the applicability of this expression only to interest accruing after the commencement of the Act. Therefore, if the generality or the apparent width of the expression employed in the sub-section is to be given effect to, the provision will apply to both the cases. It may happen that in a particular case, with reference to the past interest, a debtor had been regular and prompt in paying and

1. (1963) 1 M.L.J. 202 : I.L.R. 1963 Mad. 832 : A.I.R. 1964 Mad. 30.

whatever interest had accrued prior to the commencement of the Act was actually paid by him. In such a situation, to apply sub-section (3) to the interest accrued prior to the commencement of the Act and otustanding on the date of the commencement of the Act, is to confer a benefit on a debtor who had been in default in the payment of interest in preference to one who had been regular and prompt in the payment of interest. Such a consequence should not ordinarily be presumed or intended to be produced, unless the statute itself contains clear provisions to bring about such result or consequence.

43. In our opinion, sub-section (3) of section 7 has to be read with sub-section (1) of that section and it covers the same transactions. As we have pointed out already sub-section (1) prohibits charging of interest in excess of the rate referred to therein ,while sub-section (3) prohibits the demanding or taking of interest, whether by way of interest, profit or other sum, in excess of that payable under sub-section (1). One of the unscrupulous practices prevalent among the professional money-lenders was to charge a high rate of interest on loans advanced by them and obtain from the borrowers, documents for amounts much larger than what were actually lent and not to keep proper accounts. It may happen that a money-lender, in order to keep himself within the four corners of the law, may charge the rate of interest prescribed by sub-section (1) and mention the same in the document evidencing the loan. However, he may actually demand or take from the debtor interest at a rate higher than the rate stipulated in the document itself. Such a practice is not unknown among the pawn-brokers or money-lenders. It is only to prevent such circumvention and to make the provisions for the stipulation of the rate of interest not exceeding the maximum prescribed by the statute effective, sub-section (3) has been enacted. That is, the maximum rate of interest prescribed by the statute has to be observed at every stage, namely, at the stage of charging, demanding or taking. If sub-section (3) has not been there in the statute book, a contention may be put forward that what sub-section (1) prohibits is only the charging of interest above the prescribed rate, but there is nothing in the Act preventing a money-lender from taking from the debtor interest in excess of that charged or prescribed by the statute. In order not to give scope for such a contention only, sub-section (3) has been enacted, with the result that a money-lender has to charge, demand and take interest only in accordance with the rate prescribed in the statute. As a matter of fact, section 7 of the Tamil Nadu Act in question is a reproduction of section 6 of the Tamil Nadu Pawn-brokers Act, 1943, except for the difference necessitated by the very fact of the 1943 Act being applicable to pawn-brokers and the Tamil Nadu Act of 1957 being applicable to money-lenders and for small verbal change in sub-section (3).

44. The Counsel for both sides were not able to draw our attention to any direct decision bearing on the question for consideration before us. However, Mr. Ratnam, learned Counsel for the appellant drew our attention to two decisions of the Bombay High Court, namely, *Sajanlal Jhaverilal and Co.* v. *Gulabchand Keshrichand and others*[1], and *Bansilal-Ramgopal Bhattad* v. *Harishchandra Tatya Bhambhure*[2]. The decision in the former case primarily turned on the expression, "suit to which this Act applies" as contained in section 2, clause 17 of the Bombay Money-lenders Act, 1947. Therefore, it is not of any assistance even though the judgment contains the general principle of interpretation, namely, "Normally all legislation is prospective and an intention to divest the citizens of vested rights will not be imputed to the Legislature, unless it is expressed or by clear intendment implied. Where the Legislature intended to deprive parties governed by the Act of their rights, express provision was made by the Legislature, see sections 23, 24 and 28". The latter decision was concerned with section 23 of the Bombay Moneylenders Act, 1946 to which we have already referred and which in express terms is retrospective. Consequently, neither of the decisions of the Bombay High Court helps us to interpret the particular provisions in the Tamil Nadu Act which we have considered.

1. A.I.R. 1953 Bom. 125.
2. A.I.R. 1953 Bom. 420.

45. Having regard to the considerations mentioned above, we are clearly of the opinion that section 7 (3) of the Tamil Nadu Act, 1957, has no application to advances made prior to the commencement of that Act and the interest payable in respect thereof.

46. Under these circumstances, the appeal fails and the same is dismissed. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Maharajan, J.*

Ramaswami Gounder, son of Appachi Gounder and others .. *Appellants**

v.

Ramaswami Gounder son of Sankara Gounder and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 91 and Civil Procedure Code (V of 1908), Order 34, rule 1 — Suit by mortgagee for sale—Purchaser of part of hypotheca not impleaded in suit—Entire property sold and purchased by stranger in Court sale—Suit by purchaser of part of the hypotheca for redemption—Redemption of part of hypotheca to be allowed—Multiplicity of suits to be avoided.

A subsequent purchaser of the equity of redemption in a part of the hypotheca who had not been impleaded as a party to a mortgage action filed by the mortgagee, is, after the mortgage decree had resulted in a Court sale in favour of a third party, entitled to redeem only the part of the hypotheca purchased by him.

Though the mortgage decree and sale held in execution thereof would be clearly binding upon the parties thereto including the primary mortgagors, it would not bind the subsequent purchasers of a portion of the hypotheca and who were not impleaded in the mortgagee's suit. Their right of redemption would remain intact notwithstanding the fact that the mortgagor's right to redeem had been extinguished by the sale under the hammer of Court. [*Para.* 2.]

The rule of contribution would be applicable as between the share purchased from the mortgagor by the purchasers of part of the hypotheca and the purchaser of the entire property at the Court-auction. In order to prevent multiplicity of suits the purchasers of part of the hypotheca should be allowed to redeem only that portion of the property which they have purchased on payment of the proportionate amount of the mortgaged money. [*Para.* 2.]

Cases referred to :—

Nilakant v. *Suresh Chandra*, (1886) I.L.R. 12 Cal. 414; *Bank of Poona* v. *N.C. Housing Society*, A.I.R. 1968 Bom. 106 at 109.

Appeal against the order of the Court of the Subordinate Judge, Erode dated 18th January, 1971 and made in A.S. No. 193 of 1968 (O.S. No. 365 of 1967 on the file of the Court of the District Munsif of Gobichettipalayam).

M. S. Venktarama Iyer, V. C. Palaniswamy and *Chenniappan*, for Appellants.

A.R. Ramanathan, P. Vedavalli, and *Bhagirathi Narayanan*, for Respondents.

The Court delivered the following

JUDGMENT:—The appellants, who were plaintiffs 1 to 4 in the trial Court, instituted a suit against defendants 1 to 6 (respondents 2, 1 and 3 to 6) for redemption of a simple mortgage dated 8th July, 1949 for Rs. 1,600. This mortgage had been granted by defendants 3 to 6 and one minor Ramasamy Gounder, represented by his guardian, the third defendant, in favour of the first defendant in respect of 6 acres, 43 cents of land. Subsequent to the date of the mortgage, the fifth defendant sold 5 cents out of the hypotheca in favour of the first plaintiff for Rs. 600 on 17th September, 1962. On 22nd October, 1962, the fourth defendant sold 5 cents out of the hypotheca in favour of the second plaintiff under a registered deed of conveyance. On 19th November, 1962, defendants 3 to 6 conveyed 10 cents out of the hypotheca in favour of the plaintiffs 3 and 4 under a registered deed of conveyance. Some time in 1963, that is to say, after these three conveyances relating to small portions of the hypotheca, the first defendant

* A.A.O. No. 271 of 1971. *14th September*, 1973.

mortgagee instituted O.S. No. 648 of 1963 on the file of the District Munsif's Court, Gobichettipalayam, for recovery of the money due under the mortgage dated 8th July, 1949. Evidently, by inadvertence he failed to implead in the suit the subsequent alienees of parts of the hypotheca, *viz.*, the plantiffs 1 to 4. The mortgagee obtained a preliminary decree, and then a final decree, and in execution of the final decree, brought all the items of the hypotheca including the alienated items to sale. At a judicial sale held on 16th January, 1967, the second defendant, who was a third party to the proceedings, purchased all the items of the hypotheca for Rs. 3,500 and obtained delivery of possession (*Vide* Exhibit B-2 dated 18th December, 1967). Later, the plaintiffs, who were subsequent purchasers of portions of the hypotheca, instituted the suit for redemption out of which this appeal arises. The basis of their claim was that inasmuch as they had not been impleaded as parties to the mortage action the decree and sale in O.S. No. 648 of 1963 were not binding upon them, and that they were entitled to redeem the entire suit items although they were purchasers of part only of the equity of redemption from the original mortgagor. The learned District Munsif granted the plaintiffs a preliminary decree as prayed for with costs. Against this judgment and decree of the trial Court the second defendant preferred an appeal in A.S. No. 193 of 1968 on the file of the Sub-Court, Erode. The learned Subordinate Judge held that though the plaintiffs were not impleaded in the mortgage action, they were entitled to redeem, not the whole of the mortgage, but only the shares that had been alienated in their favour. Upon this view, the first appellate Court set aside the judgment and decree of the trial Court and remanded the suit to the trial Court with a direction to pass a revised preliminary decree after determining the amount payable by the plaintiffs towards the suit mortgage for redemption of their share only. It is against this order of remand that the present civil miscellaneous appeal has been filed.

2. The intriguing question that arises for consideration is whether the subsequent purchaser of the equity of redemption in a part of the hypotheca, who had not been impleaded as a party to the mortagage action filed by the mortgagee, is, after the mortagage decree has resulted in Court sale in favour of a third party, entitled to redeem the whole of the mortgage, or only part of the hypotheca, purchased by him. Rule 1 of Order 34, Civil Procedure Code provides:

> "Subject to the provisions of this Code all persons having an interest, either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

The plaintiffs, who are alienees of parts of the hypotheca, are undoubtedly persons having an interest in the mortgage-security, and under section 91 of the Transfer of Property Act, they are entitled to redeem the mortgage property. It would, therefore, follow that the plaintiffs ought to have been joined as parties to the mortgage action. What, then, is the legal effect of the failure of the mortgagee to implead the plaintiffs as parties to the suit? Where a person, who ought to have been joined as a party under this rule, is not joined as a party and a decree is passed in the suit, the decree cannot affect his rights. Though the mortgage decree and the sale held in execution thereof would be clearly binding upon the parties thereto including the primary mortgagors, it would not bind the plaintiffs, who were the subsequent purchasers of a portion of the hypotheca and who were not impleaded in the mortgagee's suit. In other words, their right of redemption of the mortgage in favour of the first defendant would remain intact notwithstanding the fact that the mortgagor's right to redeem had been extinguished by the sale under the hammer of Court. Is this right of the plaintiffs to redeem partial or total? Redemption is as much a right as a disability. A purchaser of a part of the hypotheca would ordinarily be interested in redeeming only his share of the hypotheca. But the law would not allow him to do so, for the reason that the distintegration of the mortgage-security would result in great injustice to the mortgagee. The Judicial Committee in *Nilakant* v. *Suresh Chandra*[1]. observed as follows:

1. (1886) I.L.R. 12 Cal. 414.

"It would put him (the mortgagee) to a separate suit against each purchaser of a fragment of the equity of redemption, though purchasing without his consent, and he would have to bring separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment woud be created."

The proviso to section 60 of the Transfer of Property Act runs as follows:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part, the share of a mortagagor."

The language of the proviso shows that piecemeal redemption, which is an advantage from the point of view of "a person interested in a share only of the mortgaged property", is interdicted, and the liability of a total redemption of the mortgage is imposed even upon persons like the plaintiff, who are interested in a minor share only of the hypotheca. When I questioned Mr. M. S. Venkatarama Iyer, learned Counsel for the appellants, as to why his clients should prefer a total redemption of the mortgage to partial redemption of their share of the hypotheca, he said that the hypotheca had been sold for a song and that the appellants are really fighting the battle of the original mortgagors. It is unnecessary to investigate whether this motivation for the plaintiffs' suit for total redemption is legitimate. It may be recalled that the plaintiffs have purchased from the mortgagors only 20 cents out of 6 acres, 43 cents of the hypotheca. The entirety of the hypotheca has been sold in execution of the decree, and the second defendant, who is a third party, has purchased the same • in Court-auction. This purchase, as I have already held, is not binding upon the plaintiffs, because they were not parties to the mortgage action. What then is the relative position of the plaintiffs and the third party auction-purchaser? The third party auction-purchaser is now the owner of the entire hypotheca other than the items purchased by the plaintiffs. The mortagage, in so far as it related to the items purchased by the plaintiffs, must still be deemed to be subsisting. As for the plaintiffs, they are owners of the equity of redemption of a part of the hypotheca and they are entitled to ignore the mortgage decree and the sale in pursuance thereof and claim to redeem the whole mortgage. In other words, the property subject to mortgage now belongs to two different persons (the plaintiff and the second defendant) having distinct and separate rights of ownership therein. Section 82 of the Transfer of Property Act prescribes as follows:

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deducting of the amount of any other mortgage or charge to which it may have been subject on that date."

The rule of contribution would, therefore, be applicable as between the share purchased from the mortgagors by the plaintiffs and the share purchased by the second defendant at the Court-auction. If the plaintiffs are allowed to redeem the entirety of the mortgage, the second defendant, as purchaser of the property at the Court sale and as owner of the equity of redemption of the bulk of the hypotheca, would be entitled to file a suit for redemption against the plaintiffs, who have been subrogated to the mortgagee's right. In such a case, the Court would be called upon to decide the contribution to be made by the two part owners of the property in respect of the mortgage debt and allow the second defendant to redeem the entire property minus the 20 cents purchased by the plaintiffs from the mortgagors. As observed by a Division Bench of the

Bombay High Court in *Bank of Poona* v. *N.C. Housing Society*[1], if the very purpose of Order 34, rule 1, Civil Procedure Code is to prevent multiplicity of suits, it is difficult to see why in this very suit by the plaintiffs the same result cannot be brought about by holding that the plaintiffs are entitled to redeem only that portion of the property which they have purchased on payment of the proportionate amount of the mortgage money. The first appellate Court has relied upon this ruling of the Bombay High Court in *Bank of Poona* v. *N.C. Housing Society*[1], and held that the plaintiffs are entitled to redemption of their share only. I think the solution offered by the Bombay High Court is in accord with equity and the true legal position. It follows the ruling and confirm the findings of the first appellate Court, and dismiss this appeal with costs. Leave refused.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

B. Tiruvalloor Pillai .. *Appellant**

v.

Seshadri Iyer and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 80—*Notice of suit by a person—Person claiming under him—Whether can file suit without fresh notice—Principles.*

The plaintiff's mother issued a notice under section 80 of the Civil Procedure Code. The plaintiff had no interest in the suit property as he had assigned all the rights accruing to him on the death of his mother in the suit property, in favour of his wife. Hence it cannot be said that the plaintiff has filed the suit as a person claiming interest in the suit property under his mother. The plaintiff having no subsisting interest in the property which is the subject-matter of the suit cannot rely on the notice issued by his mother nor can he maintain the suit in his own right. In this view, the plaintiff's suit should be held to be incompetent. [*Para.* 12.]

Cases referred to :—

Bachchu Singh v. *The Secretary of State for India in Council*, (1903) I.L.R. 25 All. 187; *Venkata Rangiah Appa Rao* v. *The Secretary of State for India in Council*, (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: A.I.R. 1931 Mad. 175; *Madhav* v. *Secretary of State*, A.I.R. 1930 Bom. 367; *Venkata Rangiah* v. *Secretary of State for India*, (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389; *Zamindar of Sivaganga* v. *Muthayya Chettiar*, (1937) 2 M.L.J. 466: 43 L.W. 535: A.I.R. 1936 Mad. 583; *State of Andhra Pradesh* v. *G.V. Suryanarayana*, A.I.R. 1965 S.C. 11: (1964) 4 S.C.R. 945; *B.R. Sinha* v. *State of M. P.*, A.I.R. 1969 S.C. 1256: (1970) 1 S.C.J. 118: (1969) 3 S.C.R. 955; *Vellavan Chettiar* v. *Government of the Province of Madras*, A.I.R. 1947 P.C. 197: 74 I.A. 223: (1947) 2 M.L.J. 208: I.L.R. (1948) Mad. 214 ; *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia*, A.I.R. 1949 P.C. 143: 76 I.A. 85: (1949) 2 M.L.J. 161.

Appeal against the decree of the Court of the Subordinate Judge, Vellore (North Arcot), dated 15th March, 1971 in Appeal Suit No. 39 of 1969 preferred against the decree of the Court of the District Munsif of Sholinghur in Original Suit No. 322 of 1964.

R. Thiagarajan and *D. Peter Francis*, for Appellant.

T.K. Subba Rao, *R. Srinivasan* and *K.V. Rajan*, for 1st Respondent.

The Additional Government Pleader, for 2nd Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff who failed in both the Courts below is the appellant. He filed a suit for a declaration that the revenue sale held in respect of the suit properties is not valid and binding on the plaintiff, for a permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the properties by him or in the alternative for recovery of possession of the same. The suit properties are comprised in survey Nos. 200/6 of an extent or 2.66 acres and survey No. 201 measur-

1. A.I.R. 1968 Bom. 106 at 109.

*S.A. No. 1765 and 1971. *23rd October*, 1973.

ing 0·15 acres. The first defendant is the purchaser of the suit properties in the revenue sale and the second defendant is the State of Tamil Nadu represented by the Collector who ordered the revenue sale. Defendants 3 to 5 are the brothers of the plaintiff and the 6th defendant is his wife.

2. The suit properties belonged absolutely to one Kanakavalli Ammal, the plaintiff's mother. She had borrowed a loan of Rs. 2,000 from the second defendant for the purchase of an oil engine, the loan being repayable in 10 monthly instalments on the security of the first item of the suit properties. Exhibit B-9 dated 8th March, 1954, is the security bond executed by Kanakavalli Ammal and others in favour of the second defendant in respect of that item. But the said Kanakavalli Ammal had earlier executed a settlement deed Exhibit A-1 dated 19th November, 1951, in respect of both the items whereunder she had created a life interest for herself and another life interest in favour of the plaintiff, and thereafter granted an absolute interest in favour of the plaintiff's minor sons. As the said Kanakavalli Ammal did not pay the instalments due as per the provisions of the security bond Exhibit B-9, both the items of properties were sold by the second defendant under the provisions of the Revenue Recovery Act on 21st November, 1960 and the first defendant became the successful bidder. The sale was confirmed on 17th May, 1962 and the first defendant is said to have taken delivery of the suit p operties on 14th July, 1962. On 16th December, 1960, Kanakavalli Ammal had issued a notice under section 80 of the Code of Civil Procedure to the second defendant to the effect that she intends to file a suit for setting aside the revenue sale held on 21st November, 1960. But Kanakavalli Ammal died on 17th September, 1961. The plaintiff has thereafter filed the present suit in 1964 for the reliefs detailed above without issuing a fresh notice under section 80 of the Code of Civil Procedure but relying on the notice issued by his mother under Exhibit A-11 in 1960. In the suit the plaintiff has questioned the validity of the revenue sale on various grounds.

3. The first defendant resisted the suit contending that the revenue sale was not invalid as alleged by the plaintiff, that the properties had been sold for a reasonable price that there was no irregularity in the conduct of the sale, that the sale was confirmed only after the plaintiff and defendants 3 to 5 had exhausted their remedies provided under the Revenue Recovery Act upto the Board of Revenue for setting aside the sale and that in any event, the plaintiff had no subsisting interest in the suit properties. It was also contended that the suit is barred under sections 37-A, 38 and 59 of Madras Act II of 1864 and that the suit is also bad for want of notice under section 80. The stand taken by the second defendant was practically the same. Defendants 3 to 6 supported the case of the plaintiff.

4. The trial Court, after considering the evidence adduced by the parties, both oral and documentary, held that the revenue sale as regards item 1 was valid but that the said sale in relation to item 2 was bad in view of the fact that item 2 had not been included in the security bond Exhibit B-9. It therefore declared that the sale of item 2 was invalid and directed delivery of possession of the said item to the plaintiff. The trial Court had held that though the plaintiff had not in fact issued a notice under section 80, Civil Procedure Code, the notice issued by his mother under Exhibit A-11 could be availed of by him and, that therefore, the suit was not liable to be dismissed for want of proper notice under section 80, Civil Procedure Code.

5. The plaintiff appealed as regards the dismissal of the suit so far as it related to the first item and the first defendant filed his memorandum of cross-objections questioning the decree of the trial Court setting aside the revenue sale in relation to item 2. The second defendant filed a separate appeal challenging the decision of the trial Court as regards item 2. The lower appellate Court however, took the view that the notice issued by the plaintiff's mother under Exhibit A-11 cannot be taken advantage of by him, and that he not having issued a fresh notice under section 80, Civil Procedure Code, his suit is not maintainable. It also held that Kanakavalli Ammal, the plaintiff's mother having died on 17th September, 1961, and the life-interest

which had been created in his favour under the settlement deed Exhibit A-1 having been parted with by him in favour of his wife under an earlier settlement deed Exhibit B-31 dated 27th July, 1961, he had no subsisting interest in the suit properties so as to clothe him with a right to challenge the revenue sale and that, therefore, he had no cause of action to maintain the present suit. The lower appellate Court also went into the question of the validity of the revenue sale and held that the same was *null* and *viod* in view of the various irregularities and vitiating circumstances. But in view of its finding that the plaintiff had no subsisting interest in the suit properties on the date of suit and that the suit was bad for the non-issue of a notice under section 80, Civil Procedure Code by the plaintiff, it dismissed the suit.

6. In this second appeal, Mr. Parasaran, learned Counsel for the appellant contends that the finding of the lower appellate Court that the plaintiff had no subsisting interest or right to question the revenue sale in relation to the suit properties and that the suit was bad for want of notice under section 80, Civil Procedure Code cannot legally be sustained. The learned Counsel for the first defendant besides supporting the said finding of the lower appellate Court, questioned its findings that the revenue sale is *null* and *void* in relation to both the items of properties. As the question of the validity of the sale will arise only if the suit is maintainable, I proceed to deal with the question of the maintainability of the suit.

7. As already stated defendants 1 and 2 have taken up the stand that the plaintiff has no subsisting interest in the property so as to entitle him to maintain the suit and that in any event the notice issued by his mother Exhibit A-11 under section 80 of the Code of Civil Procedure cannot be availed of by him and therefore, the suit filed by him without the issue of a fresh notice under section 80 was bad. The plaintiff's stand is that though he has parted with his interest in the properties under Exhibit B-31 dated 27th July, 1961 in favour of his wife, he is entitled to question the validity of the revenue sale as a legal representative of his mother and that in any event the plaintiff's wife having been impleaded as the 6th defendant in the suit, the suit cannot be dismissed on the ground that the plaintiff has no subsisting interest. It is also his case that the notice issued by his mother under Exhibit A-11 would enure for his benefit and that he is entitled to file the suit on the basis of the said notice without himself issuing a fresh notice under section 80.

8. In *Bachchu Singh* v. *The Secretary of State for India in Council*[1], it was held that to permit a successor to rely on a notice given by the predecessor will amount to adding words to section 49 of the Court of Wards Act and that a notice given by a person under that section is not available to a successor-in-interest. *Madhav* v. *Secretary of State*[2], laid stress on the omission from section 80 of the Code of Civil Procedure of 1908 of the word "intending" from the expression "intending plaintiff" found in section 424 of the old Code, and held that the benefit of the notice issued under section 80, Civil Procedure Code cannot be taken advantage of by another. In *Venkata Rangiah AppaRao* v. *The Secretary of State for India in Council*[3] Sundaram Chetty, J., had expressed the view that there should be identity of the person who issued the notice with the person that brings the suit, that a suit brought by a legal representative of a deceased person and a suit brought by a transferee would offend against section 80, Civil Procedure Code if the notice required by that section was given by the deceased man or the transferor. The above decision of Sundaram Chetty, J., has been confirmed by a Division Bench in *Venkata Rangiah* v. *Secretary of State for India*[4], and has also been followed by the Bombay High Court in *Secretary of State* v. *Hargovandas*[5].

9. In *Zamindar of Sivaganga* v. *Muthayya Chettiar*[6], Varadachariar, J., however held that the legal representatives and assignees must *prima facie* be taken to be included in any reference to a person in a statute,

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1. (1902) I.L.R. 25 All. 187.
2. A.I.R. 1930 Bom. 367.
3. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: A.I.R. 1931 Mad. 175.
4. (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389.
5. (1935) 37 Bom. L.R. 341.
6. (1937) 2 M.L.J. 466: 43 L.W. 535 : A.I.R. 1936 Mad. 583.

unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property and that, therefore the legal representatives of the predecessor who issued the notice under section 80 are entitled to maintain the suit on the basis of the said notice. Referring to the view of Sundaram Chetty, J., in *Venkata Rangiah Appa Rao* v. *The Secretary of State of India in Council*[1], that there should be identity of the person who issued the notice with the person who brings the suit, the learned Judge observed:

> "In a sense, this will be correct, that is, if legal identity is all that is required and the transferee or heir is in law the continuation of the person of the transferor or ancestor. But, I am not, with all respect, prepared to accept the correctness of the statement of the learned Judge, if physical identity of the person is to be insisted on. To take a converse illustration, it is well established that notwithstanding physical identity, a person claiming in his own right is legally different from the same person claiming as a trustee. It seems to me much more consistent with the purpose of provisions like section 80, Civil Procedure Code or section 49 of the Court of Wards Act to hold that notwithstanding the physical identity of the person, a notice given in one character will not avail when the claim is made in the other character than to hold that the physical identity of the individual is the deciding factor".

In that case the plaintiff relied upon the notice given by a former proprietor under section 49 of the Court of Wards Act whose interest was purchased by the plaintiff later on to sustain the suit filed by him. The question was whether there was sufficient notice satisfying that provision. It was held that the provisions of section 49 should be construed in the light of well established general principles of law and that the notice given by a person, when it otherwise satisfied the requirements of law, should be taken to be available for the benefit of the persons claiming under him. The learned Counsel for the appellant very strongly relies on the said decision of Varadachariar, J., and contends that the view expressed in the decision is the correct legal position and that if the notice already issued by the mother of the plainiff under Exhibit A-11 satisfies the requirements of section 80, Civil Procedure Code then it will enure to the benefit of the plaintiff who is one of her legal representatives claiming under her.

10. The learned Counsel also refers to the decisions of the Supreme Court in *State of Andhra Pradesh* v. *G.V.Suryanarayana*[1] and *B.R. Sinha* v. *State of Madhva Pradesh*[2] in support of his submission that the object of notice under section 80 of the Code is only to give the Government or the public servant concerned an opportunity to consider the legal position and to make amends or settle the claim out of Court, that though the section is imperative and must be so strictly construed that the failure of complying with the requirements in the section will entail the dismissal of the suit, the notice must be reasonably construed, and that the absence of identity of the persons filing the suit with the persons who issued the notice cannot be taken to be fatal to the maintainability of the suit. In the former case the suit was filed in a representative capacity after getting the requisite permission of the Court and the plaint complied with the requirements of section 80. It was contended that the notice under section 80 having been issued by the plaintiff and another and the suit having been filed only by the plaintiff, the suit was defective. While meeting that contention the Supreme Court expressed the view that the mere fact that another person who had joined the plaintiff in serving the notice under section 80 but did not join in seeking the permission of the Court would not render the plaint and the proceedings in the suit defective. The above decision of the Supreme Court is mainly rested on the fact that the plaintiff had filed the suit in a representative capacity and therefore all the persons who issued the notice need not be arrayed as plaintiffs. Their Lordships of the Supreme Court in that case had however, expressed the view that if more than one person had instituted the suit claiming reliefs

1. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: A.I.R. 1931 Mad. 175.

1. (1964) 4 S.C.R. 945: A.I.R. 1965 S.C. 11.
2. (1970) 1 S.C.J. 118: (1969) 3 S.C.R. 955: A.I.R. 1969 S.C. 1256.

personally to them but not all had served the statutory notice, the suit will have to fail in view of the decision of the Privy Council in *Vellavan Chettiar* v. *Government of the Province of Madras*[1], and *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia*[2].

11. In *Vellavan Chettiar* v. *Government of the Province of Madras*[1], a notice was given by one plaintiff stating the cause of action his name, the description and the place of his residence and the relief which he claimed but the suit was instituted by him and another. The Privy Council observed:

> "The section (section 80) according to its plain meaning, requires that there should be identity of the person who issues the notice with the person who brings the suit. See *Venkata Rangiah Appa Rao* v. *Secretary of State*[3], and on appeal, *Venkata Rangiah* v. *Secretary of State for India.*[4] To hold otherwise would be to admit an implication or exception for which there is no justification."

In *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia*[2], two trustees of a Trust served a notice under section 80 intimating that the trustees intended to institute a suit against the Government on a cause of action for the relief set out therein. One of the trustees died before the plaint was lodged in Court, and two more trustees were appointed in the place of the deceased trustee. Thereafter the two new trustees and the surviving trustee filed the suit. No notice was served on the Government on behalf of the two new trustees. The Privy Council held that the suit was bad for the reason that

> "the provision of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit."

In *B.R. Sinha* v. *State of M.P.*[1], the question was whether a notice issued by a karta of a joint family could be availed of by a co-parcener who had become divided subsequent to the said notice. The Supreme Court expressed the view that though section 80 is imperative and the non-compliance therewith will entail the dismissal of the suit, the notice issued under the section must be construed reasonably and any unimportant error or defect therein cannot be permitted to be treated as an excuse for defeating a just claim and that in considering whether the provisions of the statute are complied with, the Court must take into account the object of the Legislature, namely, to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position, and that if on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defect or irregularities should be ignored. In that case the Court held that there was substantial identity of the person who had given the notice with the persons filing the suit as the notice has been given by the karta as a representative of the joint family and therefore, the notice given by the karta was sufficient to sustain the suit brought by a divided co-parcener.

12. Keeping the principles enunciated in the above cases in mind, let us consider the facts of this case. As already stated the notice Exhibit A-11 was issued by the plaintiff's mother on 16th December, 1960, under section 80. Subsequently the plaintiff's mother died in 1961. On that date the plaintiff had no interest in the suit property as he had assigned all his rights accruing to him on the death of his mother in the suit property in favour of his wife under Exhibit B-31 dated 27th July, 1961. Therefore, it cannot be said that the plaintiff has filed the suit as a person claiming interest in the suit properties under his mother. If the plaintiff were to be taken as the legal representative of his mother then his brothers D-3 to D-5 also her legal representatives, should have been joined as plaintiffs so that it could be said that there is identity between the person who issued the notice

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1. 74 I.A. 223: (1947) 1 M.L.J. 208: I.L.R. 1948 Mad. 214: A.I.R. 1947 P.C. 197.
2. 76 I.A. 85: (1949) 2 M.L.J. 161: A.I.R. 1949 P.C. 143.
3. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: A.I.R. 1931 Mad. 175.
4. (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389.

1. (1970) 1 S.C.J. 108: A.I.R. 1969 S.C. 1256.

and the person who filed the suit. The facts in this case, therefore, cannot be brought even under the decision of Varadachariar, J., in *Zamindar of Sivaganga* v. *Muthayya Chettiar*[1], where the learned Judge has given a liberal construction of section 80 and held that if a notice is given by a person under that section any person claiming under him can file a suit without giving a fresh notice The plaintiff having purported to part with all his rights in the suit property under Exhibit B-31 in favour of his wife before the death of his mother he had no subsisting right in the property on the date of the death of his mother so as to entitle him to file the suit. I have to, therefore, hold that, even assuming that the notice issued by the plaintiff's mother could be availed of by her successors-in-interest, the plaintiff having no subsisting interest in the property which is the subject-matter of the revenue sale, cannot rely on the said notice issued by the mother, nor can he maintain the suit in his own right. In this view the plaintiff's suit should be held to be incompetent.

13. In view of my above finding on the maintainability of the suit, the question relating to the validity of the revenue sale need not be gone into.

14. The result is the second appeal fails and is dismissed. There will be no order as to costs. No leave.

V.S. ——— *Appeal dismissed.*

1. (1937) 2 M.L.J. 466: 43 L.W. 535: A.I.R. 1936 Mad. 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—*K. N. Mudaliyar, J.*

N Sundaramony .. *Petitioner**

v.

The State Bank of India, Kuzhuthurai Branch, represented by their Branch Manager, Kanyakumari District. .. *Respondent.*

Industrial Disputes Act (XIV of 1947), *sections* 2 (oo) *and* (*s*), 25-B *and* 25-F—*Temporary employment—Appointment to cope with additional work or to do work of permanent incumbent on leave or on deputation—Appointment order containing self-operating clause. of termination of service—Effect—Termination—If discharge of surplus labour—If retrenchment—Validity of order—Relief*—Certiorari—*Constitution of India, Article* 226.

The fact that an order of appointment contained a self-operating clause terminating the services of the employee, after providing for temporary employment for a fixed period, will not obliterate the fact that the services of the employee were terminated on a particular day. The order was none-the-less a termination order *per se* although it may contain other things, in the form of a composite order. [*Para.* 11.]

Where an employee in a branch of the State Bank of India was employed temporarily either to meet the additional work or to do the work of permanent incumbent who was on leave or on deputation to some other branch, the termination amounts to discharge of surplus labour or staff in a continuing or running industry. That would amount to "retrenchment" within the meaning of section 25-F read with section 2 (*oo*) of the Industrial Disputes Act. [*Para.* 20].

Where the impugned order of termination also amounts to "retrenchment" within the meaning of section 2 (*oo*) read with section 25-F of the Industrial Disputes Act it is void in law and a writ of *certiorari* can issue to quash such order. [*Paras.* 21 *and* 23.]

* W.P. No. 3129 of 1972. 19th *July*, 1973.

Cases referred to :

State of Bombay v. *Hospital Mazdoor Sabha*, A.I.R. 1960 S.C. 610: 1960 S.C.R. 866: 1960 S.C.J. 679 : (1960) 1 L.L.J. 251; *Ramiah* v. *State Bank of India*, (1968) 2 L.L.J. 424; *Satish Chandra* v. *The Union of India*, A.I.R. 1953 S.C. 250 : (1953) S.C.R. 655 : 1953 S.C.J 323; *Rex*, v. *Northumberland Compensation Appeal Tribunal* Ex parte *Shaw*. (1952) 1 K.B. 338; *Hariprasad* v. *A.D, Divelkar*, A.I.R. 1957 S.C. 121: (1957) S.C.R. 121: 1957 S.C.J. 83; *Murugesa Naicker Co.* v. *Labour Court*, (1963) 1 L.L.J. 495; *Pilot Pen Co.* v. *Presiding Officer, Additional Labour Court Madras*, (1971) 1 L.L.J. 241; *L. Krishnan* v. *Southern Railway*, (1972) 2 L.L.J. 568.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the concerned records from the respondent the State Bank of India, Kuzhuthurai Branch, represented by their Branch Manager, to quash the order of appointment of temporary clerks cashiers in R. M. No. 12, dated 10th November, 1972 (Exhibit "A") and to award costs of this petition.

N.G.R. Prasad, for *Row* and *Reddy*, for Petitioner.

M.R. Narayanaswamy, for Respondent.

The Court made the following

ORDER--The petitioner is a B.Sc. graduate of the Madras University. He was employed as a Cashier in the Kuzhithurai Branch of the State Bank of India from 4th July, 1970 onwards till 18th November, 1972 with intermittent break in service. He was appointed on a temporary basis, although the Cashier's work in the respondent's branch was of a permanent nature and, according to the petitioner, there was continuous need for such a person. Even after his termination another person was immediately appointed in his place. The petitioner relies on certain passages in the Desai Award and Sastry Award, which define a temporary employee "as an employee who has been appointed for a limited period of work, which is of an essentially temporary nature or who is employed temporarily as an additional employee in connection with a temporary increase in work of a permanent nature". The Cashier's work for which the petitioner was employed was neither essentially of a temporary nature, nor was it due to any temporary increase in the work of a permanent nature. The petitioner was employed for nearly 2½ years. The Cashier's work which the petitioner was doing was a permanent piece of work. The petitioner's grievance is that he was appointed on a temporary basis only with a view to deprive him of the benefits available to permanent employees under the aforesaid two awards. The petitioner has mentioned in his affidavit the period during which he worked commencing from 4th July, 1970 and ending with 18th November, 1972, although interrupted. The petitioner attributes even unfair labour practice to the respondent. He seeks to impugn the last letter of 10th November, 1972 marked as '*A*' under which his services came to an end from 18th November, 1972. He maintains that the Cashier's post is a permanent post and he has all the qualifications for being appointed permanently and his complaint is that the respondent should have appointed him as such because that work was of a permanent nature. He challenges the legality of the impugned order mainly on the basis that even assuming that the work he was doing was of a temporary nature and he became a surplus to the requirements of the respondent, when that work was over, he should have been at least paid the statutory retrenchment compensation under section 25-F of the Industrial Disputes Act for 2½ years of service because during every 12 calendar months, he had actually worked for 240 days. The respondent is an industry as defined in section 2 (*j*) of the Act. The petitioner was a workman as defined in section 2 (*s*) of the Act as he was doing work essentially of a clerical nature. At the time of the impugned order marked "*A*", he was drawing a salary, including all allowances, of Rs. 344 per month. Under section 25-B (a) (ii) and (*b*) (ii) of the Act, an employee is deemed to have completed a continuous service of one year or six months, as the case may be, if he has actually worked for

240 days during twelve calendar months in the first case or 120 days in the latter case. That the petitioner has fulfilled this requirement will be clear from the details given as per annexure 1 filed along with the writ petition. Therefore, according to the petitioner, for the 2½ years of continuous service, the respondent should have paid him the statutory retrenchment compensation under section 25-F of the Act. It is a condition precedent and failure to do so would render the impugned termination order void. Therefore even on this alternative ground the petitioner claims that the impugned order is *null* and *void*.

2. The petitioner has further stated in his affidavit that even paragraph 523 of the Sastry Award contemplates the payment of such retrenchment compensation which the respondent has deliberately failed to make. He also says that the respondent even failed to give 14 days notice as contemplated in paragraph 522 (4) of the Sastry Award before passing the impugned order. For that reason also, the 'petitioner challenges the validity of the impugned order.

3. The petitioner prays for a writ in the nature of *certiorari* for quashing the order of appointment of temporary Clerks/Cashiers RM. No. 12 dated 10th November, 1972. He also prays that he may be reposted as a Cashier.

4. The respondent, the State Bank of India, Kuzhithurai Branch., has pleaded in the counter-affidavit that the writ petition is not maintainable as the State Bank is not an authority or tribunal contemplated under Article 226 of the Constitution. According to the respondent, the relationship between the petitioner and the respondent being purely contractual and governed by the terms of the appropriate order of temporary appointment, this Court cannot be called upon the exercise its powers under Article 226 of the Constitution. The respondent contends that the two prayers of the petitioner are untenable because the order referred to as 'A' in the affidavit has already worked itself out with effect from 18th November, 1972 and hence it is not seen how it can be quashed. It is a composite order appointing the petitioner for a term as a temporary employee for the period mentioned therein and at the expiry of that period, the employment itself automatically ceased. On and from 18th November, 1972 the petitioner in the terms of the order referred to as '*A*' has ceased to be an employee and the petitioner's writ petition which has been filed into Court on 4th December, 1972 cannot have the effect of resurrecting that order.

5. The respondent does not question the accuracy or the truth of the periods of service rendered by the petitioner with intermittent breaks in service. The respondent refutes the allegation that the breaks in service have been deliberately created by the respondent with a view to deny the petitioner the benefits. The State Bank of India is constituted under the State Bank of India Act, 1955 and the Bank has formulated rules for recruitment of clerks, cashiers and other employees. Candidates for permanent appointment have got to pass a written test held by the Bank. The Bank holds periodical written tests for recruitment of clerks and cashiers on a permanent basis. Those who pass the written test qualify for an interview on the basis of which alone permanent employment could be offered. The respondent states that the petitioner was entertained on occasions as a temporary cashier from the month of July, 1970, since he possessed the prescribed minimum educational qualification and also satisfied the requirements as to age, but that he could not be considered for permanent appointment as he did not pass the written test. Subsequently the petitioner submitted an application for appointment as clerk or cashier. The Bank conducted written test in August, 1972 for recruitment of cashiers and in view of the petitioner's request, he was permitted to sit for that test. But he failed in the test and could not therefore be considered by the Bank for permanent appointment in the Bank's service. In the meantime he also completed the age of 25 on 20th November, 1972. The Bank could not consider him for permanent employment after the said date in view of the existing rules governing appointment of clerks and cashiers.

6. The Kuzhthurai Branch has four cashiers appointed on a permanent basis. But occasions do arise when any one or more of these four permanent cashiers

either goes or go on leave or when there is temporary increase in the work in the cash department and on such occasions temporary cashiers have to be appointed to cope up with the work. The local branch Agent has no powers to appoint cashiers on a permanent basis. The respondent admits that the petitioner was appointed on a temporary basis on various occasions either to fill up a leave vacancy, or to cope up with the temporary increase in work, between 4th July, 1970 and 18th November, 1972. The respondent questions the validity of the petitioner's reliance on the Sastry Award. The respondent states that the orders of temporary appointment of the petitioner make it clear that no right is conferred on him in respect of any claim for absorption in the Bank's permanent establishment in any category and it is, therefore, not open to the petitioner now to contend that the post of the cashier is of a permanent nature, or that any violation of any of the Awards has been committed by the respondent. The temporary appointments of the petitioner on the dates mentioned in the table were made either in a leave vacancy, or to cope up with the temporary increase in work at the Branch. The respondent has mentioned in the counter-affidavit the need for the appointment of the petitioner for the period from 18th November, 1971 to 17th December, 1971. The respondent refers to a leave vacancy from 18th December, 1971 to 17th January, 1972. As a third instance, the respondent mentions the necessity for appointment of a temporary cashier as one cashier from the Branch was deputed to the Reserve Bank. There is a further instance of increase in work at the close of the financial year as the need for appointing the petitioner. Undoubtedly, as contended by the respondent, it would be seen that the temporary appointment of the petitioner as cashier was either due to additional work or due to a permanent incumbent going on leave or on deputation to some other branch. The respondent also mentions about the test held on 2nd August, 1972 at Palayamkottai and the failure of the petitioner.

7. In paragraph 9 of the counter, the respondent has stated that there is no element of retrenchment under section 25-F of the Industrial Disputes Act and that merely because the petitioner has worked for more than 240 days, he does not become eligible for receipt of retrenchment compensation, unless his services were terminated by way of retrenchment. The petitioner himself has admitted in the affidavit that after the termination of his services another person was immediately appointed in his place. Hence it is stated that there is no question of his becoming a surplus and his services being terminated on that ground. Unless a person becomes surplus to the requirements of the employer, termination of his services cannot be taken as retrenchment. There is therefore no question of the respondent failing to comply with any statutory provision thereby rendering Exhibit 'A' void. The impugned order cannot be described as an order of termination. On the plain language of the order, it is an appointment for a fixed term, the appointment automatically ceasing on the expiry of the term. Such occasions can never be described as retrenchment under section 25-F of the Act.

8. The respondent has further contended that the reliance placed by the petitioner on the Sastry Award and the Desai Award is the result of a misconception of the provisions thereof. The Bank has the power to resort to termporary appointment and any composite order of the Bank appointing a person for a definite period at the end of which the appointment automatically comes to an end is an administrative order.

9. The respondent has finally contended that the petitioner has an alternative remedy in that he could have raised an industrial dispute if he had any grievance in the matter.

10. In the rejoinder, the petitioner has stated that since during every period of twelve months, he had put in 240 days of service, the respondent should have paid him retrenchment compensation under section 25-F, which they have failed to do. Therefore the impugned order in Exhibit "*A*" is void.

11. The learned Counsel for the petitioner argued that, in view of sections 25-B and 25-F of the Industrial Disputes Act, the petitioner must have been paid retren-

chment compensation before the self-operating order resulted in the termination of the services of the petitioner on 18th November, 1972. He relied on the rationale found in the decision in *State of Bombay* v. *Hospital Mazdoor Sabha*[1]. He further contended that the payment of retrenchment compensation is a condition precedent to the termination of the service and therefore the order of termination is void. His argument runs thus: The petitioner has completed in a year 240 days of service, or at least 120 days within six months. Therefore the petitioner shall be deemed to be in continuous service and only on a proper compliance with the requirements of section 25-F, the petitioner can be retrenched by an employer. As the employer has not paid retrenchment compensation to the petitioner on or before 18th November, 1972, the condition precedent for the termination of the services of the petitioner has not been complied with and, therefore, the impugned order is void in law.

Section 2 (*oo*) of the Industrial Disputes Act states:—

> "retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action......"

We are concerned with the material portion of this definition which contains the significant phrase "for any reason whatsoever". The fact that the impugned order does contain a self-operating clause terminating the services of the petitioner, after providing for temporary employment for a fixed period, does not obliterate the fact that the petitioner's services are terminated on a certain day. Instead of passing a separate order terminating the services of the petitioner, after the fixed term of 8 days of temporary employment, the very order of appointment contains the termination clause. Therefore, in my view, it is nonetheless a termination order *per se*, although it may contain other things in the form of a composite order. That the petitioner is a workman is not disputed and that the State Bank is an industry is also not disputed. The question whether the impugned order contained the order of termination is answered by me.

12. Mr. M. R. Narayanaswami, the learned Counsel for the respondent, contended that the State Bank is not a State amenable to a writ of this Court. But I am bound by the Bench decision of this Court in *Ramiah* v. *State Bank of India*[1], holding that the State Bank of India is a public authority within the scope of Article 226.

13. The learned Counsel for the respondent has also contended that the relationship between the petitioner and the respondent is purely one of contractual relationship and, therefore, the impugned order which is a self-operating order has worked itself out and the relief asked for by the petitioner cannot be granted by the respondent. He has further contended that even assuming that the relationship is not one of master and servant based on contractual relationship the termination of the services of the petitioner is certainly not a result of surplus labour and that since the Industrial Disputes Act is a self-contained Code, it is certainly open to the petitioner to go before the Industrial Tribunal or Labour Court and raise an industrial dispute. His argument is that the State Bank has the right to employ temporary employees and that the relationship is as between master and servant. In support of his argument, he relied on the following decisions.

14. In *Satish Chandra* v. *The Union of India*[2], the petitioner was employed by the Government of India on a five year contract in the Directorate-General of Resettlement and Employment of the Ministry of Labour. This was after selection by the Federal Public Service Commission. The contract of service was due to expire in 1950. By a letter dated 30th June, 1950 the Government of India made a new offer to continue him on the expiry of his contract on the terms specified in that letter. One of the terms was that he would be continued in the post temporarily for the period of Resettlement and Employment Organisation. He accepted the offer and continued in service. These facts undoubtedly prove that the

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1. (1960) 1 L.L.J. 251 : 1960 S.C.J. 679 : 1960 S.C.R. 866 : A.I.R. 1960 S.C. 610.

1. (1968) 2 L.L.J. 424.
2. 1953 S.C.J. 323 : 1953 S.C.R. 655 : A.I.R. 1953 S.C. 250.

petitioner in that case was a temporary servant employed by the Government of India. He is certainly not a workman within the meaning of the Industrial Disputes Act who should be deemed to be in continuous service by reason of the number of days of service in compliance with the requirements of section 25-B of that Act. The Supreme Court held on the basis of the facts in that case that there can be no grievance against an order of temporary employment on special terms as opposed to permanent employment. The entire case was judged in respect of the alleged violation of Articles 14, 16 and 311 of the Constitution. I am afraid this judgment has no relevance to the facts of the instant case.

15. Again, in *Ramiah* v. *State Bank of India*[1], the service agreement provided for termination of the services of the employee by giving two months notice. The employee was called upon to explain certain charges of misconduct. There was an allegation of misconduct against him. The order terminating the services of the employee stated that even though he could have been dismissed from service for misconduct alleged against him, he was discharged from service in pursuance of the terms of the agreement of service on payment of two months wages and allowances in lieu of notice. It was rightly held by Veeraswami, J., as he then was, that such action of the public authority in the circumstances could not be assailed in a writ petition on the ground that it was really a case of dismissal. It was ultimately found that the termination of the services of the employee was made in substantial compliance with the relevant clause of the service agreement. He was not found to be a workman within the meaning of section 2 (*s*) of the Act. The principal question raised in that case was whether the order of dismissal was clothed in the garb of termination. Ultimately it was held that the order made by the Bank authorities was in pursuance of a service condition. I am afraid the reasoning in this judgment is not helpful in the instant case.

1. (1968) 2 L.L.J. 304.

16. I have therefore no hesitation in rejecting the argument based on contractual liability.

17. I am unable to appreciate how the prayer is an untenable one. If the impugned order embodied in Exhibit '*A*' is a void one and if the petitioner in the eye of law is deemed to be in continuous employment in view of sections 25-B and 25-F, I am unable to see any reason why the prayer should be held as not valid. The learned Counsel for the petitioner relied on the rationale found in *Rex* v. *Northumberland Compensation Appeal Tribunal* Ex parte *Shaw*[1], wherein it has been held that an order for *certiorari* can be granted by the Divisional Court to bring into the King's Bench Division to be quashed a decision of an inferior Court, such as a statutory tribunal, on the ground of error on the face of the record.

18. Mr. M.R. Narayanaswami contended that there has been no reduction in the quantum of work in the Branch at Kuzhuthurai and, therefore, the order of termination would not be tantamount to retrenchment and that unless there is surplus labour, the petitioner cannot be said to be retrenched. The learned Counsel relied on the following observation in the decision in *Hariprasad* v. *A.D. Divelkar*[2]:

> "On our interpretation, in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry."

19. The learned Counsel for the respondent then relied on the decision of *Murugesa Naicker Co.* v. *Labour Court*[3]. Veeraswami, J., as he then was, held in that case that the expression "retrenchment" must be understood in its ordinary sense and every termination would not be retrenchment and that the termination in order to be retrenchment should be of surplus labour or staff and it should be in an industry which in continuing and not closed, or transferred. In my view, this decision only follows the ratio found in the above Supreme Court decision.

20. The respondent admits in the counter that the petitioner was employed tem-

1. (1952) 1 K.B. 338.
2. 1957 S.C.J. 83: 1957 S.C.R. 121: A.I.R. 1957 S.C. 121.
3. (1963) 1 L.L.J. 495.

porarily either to meet the additional work or to do the work of a permanent incumbent who was on leave, on or deputation to some other branch. In the face of this averment, I find no difficulty in holding that the termination of the petitioner amounts to discharge of surplus labour or staff in a continuing or a running industry. When the permanent cashier, either on transfer or on deputation, returned to the Kuzhuthuri Branch, the petitioner was found to be surplus and therefore he was discharged. That would amount to retrenchment within the meaning of section 25-F read with section 2 (*oo*) of the Industrial Disputes Act.

21. The last argument of the respondent is that it was open to the petitioner to go before the Industrial Tribunal, or Labour Court and raise an industrial dispute and in law he is not justified in seeking a writ of *certiorari* from this Court. In my view, the decision in *State of Bombay* v. *Hospital Mazdoor Sabha*[1], would be an answer. In the said case, the termination of the two respondents was not merely held to be inoperative and void, but the Supreme Court further confirmed the propriety of the writ of *mandamus* issued by a Division Bench of the Bombay High Court. When once I hold, as I have done, that the impugned order in Exhibit '*A*' contains the termination order also and that the said termination order amounts to retrenchment within the meaning of section 2 (*oo*) read with section 25-F of the Industrial Disputes Act, I have no hesitation in holding that the impugned order is void in law and that the petitioner is justified in maintaining his prayer as he did in this case.

22. The learned Counsel for the petitioner went to the extent of contending on the strength of the ratio found in the decision of Palaniswamy, J., in *Pilot Pen Co.* v. *Presiding Officer, Additional Labour Court, Madras*[2], that even a casual worker who complies with the requirement of section 25-B of the Act is deemed to be retrenched when his services are terminated. He also relied on the decision in *L. Krishnan* v. *Southern Railway*[3]. The petitioners in that case were employed as khalasis. They acquired the status of temporary workmen. Their services were terminated between 16th January, 1970 to 23rd January, 1970. The termination was challenged on the ground that section 25-F was not complied with. Neither notice of one month nor wages for the period were tendered or paid at the time of retrenchment. A Division Bench of the Kerala High Court has held that the definition of the term retrenchment indicates that cases of termination by employer for any reason whatsoever otherwise than in the four cases referred to in the definition would amount to retrenchment. As a matter of fact, it was held that the petitioners in that case were terminated because they were found to be surplus.

23. For the foregoing, reasons I allow the writ petition with costs. The order of appointment for temporary clerks/cashiers RM. No. 12, dated 10th November, 1972 in (Exhibit '*A*') is found to be void and inoperative in law and it is therefore quashed. But I cannot issue a direction to the respondent to repost the petitioner as cashier. Counsel's fee Rs. 250.

P.S.P. ——— *Petition allowed.*

1. 1960 S.C.J. 679: 1960 S.C.R. 866: (1960) 1 L.L.J. 251.
2. (1971) 1 L.L.J. 241.
3. (1972) 2 L.L.J. 568.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*K.N. Mudaliyar, J.*

P. G. Arunachalam .. *Petitioner**

v.

The Commissioner, Corporation of Madras .. *Respondent.*

Madras City Municipal (Amendment) Act (1961), *section* 86—*Absence of by-laws—Commissioner's power to punish employees of the Corporation—Transitional provision No.* 5 *of the Schedule II with reference to section* 102—*Scope—Applicability—Meaning of the phrase "other matters"—Madras City Municipal Act (IV of* 1919), *sections* 85 *to* 97 *and section* 349.

The failure of the Corporation of Madras to frame by-laws would not enable the

*W.P. No. 230 of 1971.

28*th August*, 1973.

petitioner to choose to rely on the Transitional Provision No. 5 of Schedule II to the amending Act of 1961 read with section 102 of the same. [*Para.* 5.]

The Transitional provision No. 5 which talks about "tenure, remuneration, rights, privileges as to pension and gratuity and other matters" provides for safeguarding the rights and privileges of the employees who have entered the Corporation establishment prior to the coming into force of the amending Act. The provision does not clothe the Commissioner with the necessary power of dealing with the discipline and conduct of class III and class IV employees in the absence of by-laws framed by the Council under section 349 (of the principal Act) within the meaning of section 86 of the amending Act of 1961. [*Para.* 5.]

The phrase "other matters" occurring in the Transitional Provision No. 5 has got to be construed in the context of the preceding language in the said provision. [*Para.* 5.]

If there are no by-laws for the time being in force, particularly at the time of the infliction of punishment on the petitioner, the Commissioner cannot be permitted to fall back on the general power of control. The common law cannot be invoked in the face of the statutory provisions for such punishment. [*Paras.* 6, 7.]

Held on the date of the impugned order *viz.*, 10th November, 1969 the respondent had no power vested in him to punish the petitioner. [*Paras.* 7, 9.]

Case referred to :—

C. Kuppuswamy v. *Corporation of Madras*, W.P. No. 2451 of 1972.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Respondent in E.D.C. No. C1/1878/68, dated 10th November, 1969 and quash the said order and made therein.

A. Radhakrishnan, for Petitioner.

R. Thillaivillalan, for Respondent.

The Court made the following

ORDER:—P.G. Arunachalam, is the Petitioner. He is the Headmaster of the Corporation High School, Tiruvottiyur, Madras. He entered service in August 1950 as B.T. Assistant in the Corporation High School, Nungambakkam. He was promoted as Headmaster in June, 1964. Ever since his appointment as a teacher, he maintains that, he has been discharging his duties to the utmost satisfaction of his superiors without any blemish. He makes certain allegations against a Councillor of the Corporation in respect of admission of pupils into the High School. According to the petitioner, on the 19th June, 1968 at about 12 noon, when the petitioner was in his office in the first floor of the school, his peon came and told him that some Councillors had come and they wanted to see him. He sent word through the peon that he would be seeing them and immediately he asked the three teachers and the attender who were then in his room assisting him, to leave the room in order to enable him to attend to the Councillors. Several parents and other pupils who had come in connection with the admission of the students were also requested to wait outside. The petitioner locked the cash box and came just outside the room to lock the door. At that time, the petitioner's peon returned back and informed him that the Councillors had gone away in spite of their having information about the petitioner moving to meet them. On 25th June, 1968, the petitioner received an order from the respondent relieving him forthwith of his duties as Headmaster of the School. He handed over charge to the First Assistant on the same day. On 27th June, 1968 he was suspended with effect from 25th June, 1968 pending framing of charges. He moved this Court for suspending the operation of the orders of the respondent pending disposal of the Writ Petition No. 2413 of 1968. The writ petition was dismissed as infructuous, but the learned Judge observed that it is a shocking case of abuse of authority, and even went to the extent of awarding costs against the respondent while dismissing the writ petition. Evidently, the enquiry was conducted and completed before the date of the final disposal of the Writ Petition No. 2413 of 1968 on 21st January,

1970. The punishment of withholding of increment for six months was inflicted on the petitioner by an order dated 10th November, 1969. The finding of the respondent is extracted here below:

"Thiru P.G. Arunachalam, H.M., C.H. S. G. Koil Street, was certainly aware of the presence of the Hon'ble Members of the Central Committee, the Assistant Commissioner (S) and the Engineer in the school on 19th June, 1968. Though he was informed by the peon and the P.E.T. that the Hon'ble Members were waiting for the H.M. he failed to come down. Further, even by the time they had themselves inspected the piece of land situated behind the school building on the eastern side and returned, he did not come down to meet them. This clearly shows his discourteousness towards the Hon'ble Members of the Central Committee, and the Assistant Commissioner (South). His explanation cannot, therefore, be accepted and the charge framed against him in this behalf is held proved. The increment of Thiru P.G. Arunachalam, H.M., C.H. S.G. Koil Street, is, therefore, ordered to be stopped for six months without cumulative effect."

Hence this writ petition impeaching the validity of the impugned order.

2. The learned Counsel for the petitioner frankly stated before this Court that the grounds on which the impugned order is attacked are based on the mistaken notion that the old sections 85 to 97 of the Madras City Municipal Act (IV of 1919), are still in force and that the petitioner was unaware of the provisions of the Amending Act LVI of 1961. But the learned Counsel subsequently placed strong reliance on a judgment of this Court in *C. Kuppuswamy* v. *Corporation of Madras*[1], and argued that on the date of the impugned order passed against the petitioner, there was no power vested in the Commissioner to punish the petitioner.

3. I was unable to get thee xact date on which the amending Act LVI of 1961 came into force. But that would not assume any importance for the simple reason that the petitioner herein joined the service of the Corporation as early as 1950, long prior to the Amending Act, LVI of 1961, coming into force. In *C. Kuppuswami* v. *Corporation of Madras*[1], it was conceded by the learned Counsel for the Corporation that the petitioner therein entered the service of the Corporation only after the Amending Act, LVI of 1961, came into force, and therefore, the learned Counsel did not rely on section 102 read with Schedule II of the Amending Act LVI of 1961, for maintaining that the source and content of the power of the Commissioner to punish the employees of the Corporation is embodied in the Transitional provision No. 5 of Schedule II with reference to section 102 of the Amending Act LVI of 1961.

4. One limb of the argument of Mr. Thillaivillalan, is that, notwithstanding the absence of "by-laws made by the Council under section 349 of the principal Act, within the meaning of section 86 of the Amending Act, 1961," there is the power vested in the Commissioner by the Transitional Provision No. 5 of Schedule II read with section 102 of the Amending Act of 1961. I shall first dispose of this limb or argument before I notice the validity of the second limb, which I shall presently deal with. In the Madras City Municipal Act, *viz.*, the principal Act IV of 1919, one finds the sections 85 to 97 dealing with various aspects of the Establishments. It is of particular significance to notice the two sections *i.e.*, sections 93 and 96. They are extracted here below:

"Section 93:

Subject to the provisions of this Act and to the by-laws and regulations for the time being in force, the Commissioner shall prescribe the duties of the Corporation establishment and exercise supervision and control over their acts and proceedings and dispose of all questions relating to their conduct, service, pay, allowances, leave, pension and provident fund privileges".

1. W.P. No. 2451 of 1972 judgment dated 29th March, 1973.

1. W.P. No. 2451 of 1972.

Section 96:

"(1) Subject to the provisions of section 94 if any officer or servant in the service of the corporation other than an officer appointed under section 85, section 86 or sub-section (3) of section 87 is guilty of any breach of any departmental rules, discipline or of carelessness, neglect of duty or other misconduct, or is unfit, the authority competent to appoint such officer or servant may impose the following penalties on him, namely:—

(*i*) Censure;

(*ii*) withholding of increments or promotion, including stoppage at any efficiency bar;

(*iii*) reduction to a lower post or time-scale, or to a lower stage in a time-scale;

(*iv*) fine;

(*v*) recovery from pay of the whole or part of any pecuniary loss caused to the corporation;

(*vi*) suspension;

(*vii*) removal from the service of the corporation, which does not disqualify from future employment;

(*viii*) dismissal from the service of the corporation which ordinarily disqualifies from future employment.

(2) Any order passed under sub-section (1) shall be final:

Provided that any officer or servant in receipt of a monthly salary of not less than fifty rupees may appeal to the standing committee against any order of the Commissioner reducing, removing or dismissing him or suspending him for a period of more than one month:

Provided further that any officer or servant in respect of a monthly salary exceeding one hundred rupees may appeal to the Provincial Government against an order of dismissal, within a period of one month from the date of the order passed by the standing committee, on appeal from such order of dismissal:

Provided further that no Government servant employed by the corporation shall be dismissed from such employment without the consent of the Government concerned or until three months' notice in writing to that effect shall have been given to the chief controlling authority of the branch of the Government service to which such servant belongs;

(3) Pending a resolution of the Council the Commissioner may suspend any officer appointed by that authority:

Provided always that he shall forthwith report to the council the reasons for his action."

5. For evaluating the substance of the argument, a scrutiny of section 96 would reveal that the authority competent to appoint certain employees or servants may impose eight varieties of punishment. The said section also provides for an appeal to the standing committee by an employee who is in receipt of a monthly salary of not less than fifty rupees. There is an appeal to the provincial Government against an order of dismissal. A significant feature of section 96 is the provision for the substantive punishment of suspension. There appears to be no limitation placed on the punishment of suspension. These sections, ranging from section 85 to section 97 of the principal Act, have been impliedly repealed and sections 85 to 93 have been substituted by the Amending Act LVI of 1961. It is stated by the learned Counsel for the Corporation that the new sections were substituted because consequential arrangements had to be made resulting from the merger of large adjoining areas into the city of Madras which became enlarged territorially. The only section germane to the present discussion is section 86 of the amending Act of 1961, which is extracted here below:

"*Section* 86 : *Conditions of service of corporation establishments*:—

(1) Save as otherwise provided in this Act, the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the corporation establishment shall be regulated—

(*i*) in the case of Class I-A, Class I-B and Class II officers, by Rules

made by the State Government in this behalf;

(*ii*) in the case of the employees included in Class III and Class IV, by by-laws made by the council under section 349:

Provided that any Class I-A, Class I-B or Class II officer may be removed from office by the State Government:

Provided further that—

(*i*) the amount of any salary, leave and leave allowances, gratuity or pension granted under the said by-laws shall in any case, without the special sanction of the State Government, exceed what would be admissible in the case of Government servants of similar standing and status; and

(*ii*) the conditions under which such salary and allowances are granted or any leave, superannuation or retirement is sanctioned shall not without similar sanction be more favourable than those for the time being prescribed for such Government servants.

(2) No officer or other employee of the corporation shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(3) No such officer or employee as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply—

(*a*) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

(*b*) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for reasons to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause ; or

(*c*) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that in the interests of the security of the State it is not expedient to give to that person such an opportunity.

(4) If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under sub-section (3) or whether in the interests of the security of the State it is not expedient to give to any person such an opportunity under that sub-section, the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

(5) Every officer of the Corporation establishment shall be a wholetime officer of the corporation and no such officer shall undertake any work unconnected with his office without the permission of the commissioner:

Provided that the order of the commissioner granting such permission shall be placed before the next meeting of the Couucil."

Section 86 (1) too provides for "by-laws made by the Council under section 349 (of the principal Act) to deal with the discipline and conduct of the Corporation Establishment comprising Class III and Class IV employees". Section 86 (3) provides for the punishment of dismissal, removal or reduction in rank. It is abundantly clear that when the Legislature substituted section 86, it had the knowledge that section 96 provided for eight modes of punishment and that it was satisfied with the provision for three modes of punishment. Regarding the residual modes of punishment, the Legislature thought it fit to provide for the same by means of "by-laws made by the Council under section 349 (of the principal Act) governing the discipline and conduct of the Corporation Establishments comprising Class III and Class IV employees". It is conceded by the learned Counsel for the respondent (as was conceded by the predecessor of the present incumbent in Writ Petition No. 2451 of 1972) that the Corporation failed to frame any by-laws till now and only after the judgment in Writ Petition No. 2451 of 1972, the by-laws are now

under preparation. Therefore, the learned Counsel for the respondent desperately chose to rely on the Transitional Provision No. 5 of Schedule II to the amending Act of 1961 read with section 102 of the same. A reading of Transitional Provision No. 5 would make it clear that the said provision would apply to every person included in the Corporation establishment immediately before the date of the commencement of the amending Act, LVI of 1961. But the scope of the said provision is constricted by section 102 (1) which limits it to the first constitution of certain committees. Even assuming that the phrase, "and otherwise" would pertain to certain other matters not covered by section 102, sub-section (1) of the amending Act, LVI of 1961, I am unable to read into Transitional Provision No. 5 something pertaining to discipline and conduct of the Corporation employees. This provision, Transitional Provision No. 5, talks about "tenure, remuneration, rights, privileges as to pension and gratuity and other matters". The phrase, "and other matters" has got to be construed in the context of the preceding language in the said provision. This provision obviously provides for safeguarding the rights and privileges of the employees who have entered the Corporation establishment prior to the amending Act coming into force. At one stage, the learned Counsel for the respondent argued that the scope and amplitude of this Provision No. 5 of the Transitional Provisions in Schedule II to the amending Act, LVI of 1961 is not de-limited by the scope of section 102 of the amending Act; even assuming that this Provision No. 5 is not constricted narrowly by the main section 102 of the Act, and also giving the widest meaning to every word and phrase comprised in the said Provision No. 5, I am unable to hold that the said provision is so wide enough as to clothe the Commissioner with the necessary power of dealing with the discipline and conduct of the Class III and Class IV employees, in the absence of "by-laws made by the Council under section 349 (of the principal Act) within the meaning of section 86 of the amending Act, LVI of 1961." I find no substance in this argument.

6. The second limb of the argument of the learned Counsel for the respondent is that although that Transitional Provision No. 5 of Schedule II read with section 102 of the amending Act LVI of 1961 does not vest such power in the Commissioner to deal with the discipline and conduct to inflict punishment on the petitioner, he falls back on the language of section 91 of the principal Act (IV of 1919) as amended by the amending Act LVI of 1961. To him, section 91 of the principal Act appears to be the reservoir of power to punish the delinquent official. I extract here below section 91 of the principal Act which is now in force:

> "*Section* 91 (1) The Commissioner shall, from time to time lay before the standing committee a schedule setting forth the designations and grades of the officers and servants who should in his opinion constitutte the Corporation establishment, and embodying his proposals with regard to the salaries, fees and allowances payable to them.
>
> (2) The standing committee may either approve or amend such schedule as it thinks fit and shall lay it before the council with its remarks, if any.
>
> (3) The council shall sanction such schedule with or without modifications as it thinks fit and may from time to time amend it at the instance of the Commissioner and standing committee:
>
> Provided that no new office shall be created without the sanction of the Provincial Government if the maximum monthly salary exceeds two hundred and fifty rupees".

I also extract section 93 of the principal Act before the amending Act, LVI of 1961 came into force;

> "*Section* 93—Subject to the provisions of this Act and to the by-laws and regulations for the time being in force, the Commissioner shall prescribe the duties of the Corporation establishment and exercise supervision and control over their acts and proceedings and dispose of all questions relating to their conduct service, pay, allowances, leave, pension and provident fund privileges".

A comparison of section 93 of the principal Act with section 91 of the amending Act, LVI of 1961, would show that these two sections are substantially in *pari materia*; the language is identical and the similarity in the phraseology of the two sections is striking. The Commissioner "shall exercise supervision and control over the Corporation establishment subject to the provisions of this Act and to the rules, by-laws and regulations for the time being in force". Even section 93 of the principal Act was there in force until it was substituted by section 91 of the amending Act, LVI of 1961. Nevertheless there was the detailed provision embodied in section 96 providing for eight modes of punishment. The Legislature did not rely on the so-called general power in section 93 of the principal Act; on the contrary, there was the important section 96 (of the principal Act) placed in conjunction with section 93 (of the principal Act). But, when the Legislature made the necessary amendments to this bunch of sections *viz.*, sections 85 to 97, they provided only for three modes of punishment, as already mentioned by me, in section 86 sub-section (3) of the amending Act, LVI of 1961. It further provided, in section 86 (1) (*ii*), for "by-laws made by the council under section 349". Therefore, the so-called general power vested in the Commissioner by section 91 of the amending Act, LVI of 1961 is subject to "by-laws for the time being in force". If there are no by-laws for the time being in force, particularly at the time of the infliction of the punishment on the petitioner, the Commissioner cannot be permitted to fall back on the so-called general power of control. In law, such a thing is impermissible, particularly, in the light of sections 86 and 91 of the amending Act, LVI of 1961.

7. The respondent pleaded that even in the absence of the by-laws, the Commissioner can rely on the common law. Frankly in the face of statutory provisions for such punishments, I am unable to follow such an argument. A reading of section 102 sub-section (3) makes an ample provision for resolving any difficulty arising in first giving effect to the provisions of the amending Act, LVI of 1961, or any difficulty experienced in giving effect to the provisions of the principal Act itself. It is certainly open to the respondent to invoke the State Government's power to make such rules under section 102, sub-section (3) of the amending Act, LVI of 1961 to meet the present difficulties, or to make the necessary by-laws within the meaning of section 86 (1) (*ii*) of the amending Act of 1961 with immediate effect. I hold that on the date of the impugned order, *viz.* 10th November, 1969, the respondent has had no power vested in him to punish the petitioner.

8. The respondent relied on a concession built on the fallacy committed by the petitioner in thinking that the old bunch of sections 85 to 97 were still in force. Certainly, the petitioner is not a super-legislature to give life to the implied repeal of sections 85 to 97 which have been substituted by sections 85 to 93 by the amending Act, LVI of 1961 and the other four sections *viz.*, sections 94 to 97 which have been added by the amending Act XV of 1965. It is brought to my notice that sections 94 and 95 were later repealed by the amending Act X of 1968. This, I am stating for the purpose of completing the history of legislation in this regard.

9. The impugned order of the Respondent dated 10th November, 1969 is quashed by the issuance of a writ of *certiorari*. The writ petition is allowed as prayed for with costs. Advocate's fee Rs. 250.

——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Murugan .. *Appellant**

v.

Jayarama Pillai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 58 (c)—*Mortgage by conditional sale or outright sale—Relevant factors—"கெடு கிரயம்"—"வாய்தா கிரயம்"—Meaning—Reference to time limit and not to condition of re-purchase—Words and Phrases.*

The term "கெடு கிரயம்" means a sale which is to take effect after a particular time limit. If it is an outright sale, the document would be termed as "சுத்த கிரயம்" The term "வாய்தா கிரயம்" is more or less equivalent to "கெடு கிரயம்" and cannot possibly refer to the condition to re-purchase. [*Para.* 4.]

Held on facts, The document is styled as "கெடு கிரயம்". The most important circumstance is that the consideration is an odd sum. If it is an outright sale, the parties need not have agreed upon such an odd figure as consideration for the same. The entire sum paid by the defendant under the document went towards the discharge of loans due by the plaintiff. There is also some evidence to show that the property was worth much more than the sum mentioned in the document as on the date of the document. Yet another circumstance is that when the plaintiffs gave notice calling upon the defendant to accept the sum mentioned in the document and hand over possession of the property to them, the defendant after receiving the notice did not protest and also did not send any reply. The document is only a mortgage by conditional sale.

[*Paras.* 5, 6 *and* 7.]

Cases referred to :—

Chunchun Jha v. *Sheik Ebadat Ali,* (1955) 1 S.C.R. 174: 1954 S.C.J. 469 : (1954) 1 M.L.J. 708 : A.I.R. 1954 S.C. 345; *Bhaskar* v. *Shrinarayan,* (1960) 2 S.C.R. 117: 1960 S.C.J. 327: (1960) 1 M.L.J. (S.C.) 87 : (1960) 1 An.W.R. (S.C.) 87: A.I.R. 1960 S.C.301; *Bhoju Mandal* v. *Dhebnath Bhagat,* (1963) 2 S.C.J. 676; A.I.R. 1963 S.C. 1906; *P. L. Bapuswami* v. *N. Pattay Gounder,* (1966) 2 S.C.R. 918: (1967) 1 S.C.J 842; A.I.R. 1966 S.C. 902; *Kulathu Iyer* v. *Manickavasagam Pillai,* (1956) 1 M.L.J. 385: (1956) L.W. 548; *S. A. Khan* v. *Nawaz Khan,* (1956) 1 M.L.J. 388 : (1956) L.W. 546.

*L.P.A. No. 30 of 1969. *6th September,* 1973.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Venkatadri dated 24th October, 1968 and made in S.A. No. 1730 of 1964 preferred to the High Court, against the decree of the Court of the Subordinate Judge, Cuddalore dated 14th February, 1964 and passed in A.S. No. 8 of 1963.

(O.S. No. 430 of 1961 D.M .C. Chidambaram).

M. A. Srinivasan and *M. A. Srinivasan,* for Appellant.

R. Gopalaswamy Ayyangar, for Respondent.

The Judgment of the Court was delivered by

N. S. Ramaswami, J.—The only question in this appeal under the Letters Patent is whether the document, Exhibit A-1, is a mortgage by conditional sale or whether it is an outright sale, with a right to re-purchase. The suit was for redemption by the executants of the document Exhibit A-1, on the footing that that was a mortgage by conditional sale. The defendant contended that it is an outright sale with a right to re-purchase and that the plaintiffs having not exercised their right to re-purchase, they have no further remedy. The first two Courts held that the document was an outright sale and therefore the plaintiffs were not entitled to redemption. However, on a second appeal filed by the plaintiffs, Venkatadri, J., reversed the finding of the Courts below and allowed the appeal, holding that Exhibit A-1 is a mortgage by conditional sale. Now, the defendant in the suit has filed this Letters Patent Appeal.

2. The terms of Exhibit A-1 are that the property in question was sold for a sum

of Rs. 3,826-50, consisting of five items of consideration, and the property would be reconveyed if the vendors (the plaintiffs in the suit) repaid the said sum of Rs. 3,826-50 after five years and within seven years from the date of the document. The document is styled as "கெடு கிரயம்". Admittedly, the document comes under the purview of section 58 (*c*) of the Transfer of Property Act, as amended by Act XX of 1929. That provision says that where the mortgagor ostensibly sells the mortgaged property, on condition of such payment of the mortgage amount being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. In the present case, the condition to re-purchase is in the very document of the ostensible sale. Therefore it is not contended by the learned Counsel for the defendant-appellant that this document does not come under the purview of section 58 (*c*) of the Transfer of Property Act. That being so, the burden is heavy on the defendant to establish that the document is really an outright sale. In *Chunchun Jha* v. *Sheik Ebadat Ali*[1], it is pointed out that the Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages and that therefore it is reasonable to suppose that the persons, who, after the amendment of section 58 (*c*) of the Transfer of Property Act, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words, and if the conditions of section 58 (*c*) are fulfilled, then the deed should be considered as a mortgage. However, the learned Counsel for the appellant referred to three other decisions of the Supreme Court and contended that these decisions support his contention that this document is really an outright sale and not a mortgage by conditional sale.

3. In *Bhaskar* v. *Shrinarayan*[2], the finding is that the document in question in that case was really a mortgage by conditional sale. The learned Counsel points out that the circumstances that were present in that case are not present in the present case, and therefore, the document in the present case should not be held to be a mortgage by conditional sale. It is needless to point out that there cannot be two cases exactly similar on facts. The mere fact that the circumstances that were present in the above case are not so present in the present case is not a ground to hold that the document Exhibit A-1 is not a mortgage by conditional sale. We would presently advert to several other circumstances which do indicate that the parties intended that the document is only a mortgage by conditional sale and not an outright sale. In *Bhaju Mandal* v. *Dhebnath Bhagat*[1], on the facts of that case, it was held that the transaction was a sale and not a mortgage by conditional sale. That decision would not help the appellant in the present case. *P. L. Bapuswami* v. *N. Pattay Gounder*[2], which is also referred by the learned Counsel is against his contention. That is a case where the document, which was an ostensible sale, was held to be a mortgage by conditional sale and not an outright sale. The Supreme Court pointed out four circumstances to come to the conclusion that that document was a mortgage by conditional sale. They are: (1) the condition for re-purchase was embodied in the same document; (2) the consideration for the transaction was Rs. 4,000 while the real value of the property was Rs. 8,000; (3) the patta was not transferred to the vendee after the execution of the document and the cist for the land was also continued to be paid by the vendor; and (4) the consideration for the reconveyance was Rs. 4,000 namely, the same amount as the consideration for the original transaction. As we said, this decision is really against the contention of the learned Counsel for the appellant, for, in the present case, at least three circumstances relied on by the Supreme Court in the above case are present. In fact, over and above those three circumstances, there are several other circumstances indicating that the document is a mortgage by conditional sale. In this case also, the reconveyance

1. 1954 S.C.J. 469 : (1954) 1 M.L.J. 708 : (1955) 1 S.C.R. 174 : A.I.R. 1954 S.C. 345.
2. 1960 S.C.J. 327 : (1960) 2 S.C.R. 117 : (1960) 1 An.W.R. (S.C.) 87 : (1960) 1 M.L.J. (S.C.) 87 : A.I.R. 1960 S.C. 301.

1. (1963) 2 S.C.J. 676 : A.I.R. 1963 S.C. 1906.
2. (1966) 2 S.C.R. 918 : (1967) 1 S.C.J. 842 : A.I.R. 1966 S.C. 902.

is for the same amount as the consideration for the ostensible sale. The condition regarding the reconveyance is embodied in the very same document. Patta has not been transferred to the defendant. These are three of the circumstances relied on by the supreme Court in the above case for holding that the document in that case was really a mortgage by conditional sale, and they are also present in the present case. In addition to the above three circumstances in the present case, there are several other circumstances.

4. As we said, the document is styled as "கெடு கிரயம்". As we understand, the term "கெடு கிரயம்" means a sale which is to take effect after a particular time-limit. The learned Judge who heard the second appeal has also pointed out that according to the Lexicon, the words "கெடு கிரயம்" refer to a time-limit. If it is an outright sale, the document would be termed as a "சுத்த கிரயம்." The very fact that the parties chose to call the document a "கெடு கிரயம்" indicates that the ostensible vendee was not to get title to the property immediately on the execution of the document but only after the time-limit fixed, in the document. In this connection the learned Counsel for the appellant referred to the decision reported in *Kulathu Iyer* v. *Manickavasagam Pillai*[1]. That is a decision of a learned single Judge of this Court and one of the points considered in that case was regarding the meaning of the term "வாய்தா கிரயம்". The learned Judge remarked that the words "வாய்தா கிரயம்" in the context appeared to him as meaning nothing more than the fact that the document was a sale, with a condition to re-purchase within a fixed period. However, we are unable to share the view of the learned Judge regarding the meaning of the term "வாய்தா கிரயம் "which is more or less equivalent to "கெடு கிரயம்". "வாய்தா கிரயம்" or "கெடு கிரயம்" cannot possibly refer to the condition to re-purchase. As we said, as the term refers to a time-limit as per the meaning given in the Lexicon, it should mean that the sale is to take effect after a particular time-limit. In the decision referred to above (*Kulathu Iyer* v. *Manickavasagam Pillai*[1], the learned Judge of this Court referred to several circumstances appearing in that case, explained away each and every circumstance, and ultimately held that the document in that case was really an outright sale. But the same learned Judge had to consider a similar document in the case reported in *S.A. Khan* v. *Nawaz Khan*[2]. In the latter case that is, *S. A. Khan* v. *Nawaz Khan*[2], the learned Judge has held on similar circumstances referred to in the earlier case that the document in question is really a mortgage by conditional sale. Anyway, we are unable to take *Kulathu Iyer* v. *Manickavasagam Pillai*[1] as a precedent regarding the present question whether the document is to be treated as a mortgage by conditional sale or an outright sale.

5. Apart from the document having been styled as a "கெடு கிரயம்", there are two or three other circumstances indicating that the document is really a mortgage by conditional sale. The most important circumstances is that the consideration is an odd sum, namely, Rs. 3,826-50. If it is an outright sale, we do not understand as to why the parties should agree upon such an odd figure as the consideration for the same. It is significant to note that the entire sum of Rs. 3,826-50 paid by the defendant under the document went towards the discharge of loans due by the plaintiffs. As we said, there are five items of consideration making up the total sum of Rs. 3,826-50. The first four items are mortgages and promissory notes which had been executed by the plaintiffs and which were directed to be discharged by the defendant himself.

The fifth item is a cash consideration of Rs. 797-50. But even this amount is really for discharging sundry debts due by the plaintiffs. This fact, namely, that the consideration is for an odd amount is clearly indicative of the fact that the document is really not an outright sale. The learned Counsel for the appellant contends that the first two Courts have found that the value of the property dealt with under the document was not Rs. 7,000, as claimed by the plaintiffs, and

1. (1956) L.W. 548 : (1956) 1 M.L.J. 385.

1. (1956) 1 M.L.J. 385 : (1956) L.W. 548.
2. (1956) 1 M.L.J. 388 : (1956) L.W. 546.

that the consideration mentioned in the document was adequate. But, as pointed out by the learned Judge, there is some evidence in the case that the property was worth much more than Rs. 3,826-50 as on the date of the document. That apart, it is impossible to hold that the value of the property was exactly Rs. 3,826-50 as on the date of the document.

6. There is yet another circumstances against the appellant. The plaintiffs gave notice calling upon the defendant to accept the sum of Rs. 3,826-50 and hand over possession of the property to them, on the footing that the document, Exhibit A-1 is only a mortgage by conditional sale. The significant fact is that the appellant, after receiving the notice, did not protest. He did not send any reply at all.

7. In view of all these circumstances, we agree with the learned Judge that the document is only a mortgage by conditional sale.

8. The learned Counsel for the appellant is not right in his contention that as there is no mention of interest for the sum of Rs. 3,826-50 in the document, it should be treated not as a mortgage but as an outright sale. Admittedly, the defendant was put in possession of the property immediately on the execution of the document. He was to enjoy the property in lieu of interest. Therefore, one cannot expect any mention of payment of interest for the said sum in the document.

9. The result is, the appeal fails and is dismissed, with costs.

——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*K. S. Venkataraman and S. Maharajan, JJ.*

Gouse Bi .. *Petitioner**

v.

Salima Bi .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 41 *rules* 1 *and* 5 *and section* 151—*Limitation Act (XXXVI of* 1963), *section* 5—*Appeal—Application to excuse the delay in filing appeal—Application for interim stay pending application for excusing the delay—Jurisdiction to grant* ex parte *order of stay.*

Under Order 41, rule 5 and section 151 of the Civil Procedure Code, the High Court has jurisdiction to grant an *ex parte* order of stay pending an application filed for excusing the delay in filing an appeal. [*Paras.* 12 *and* 17.]

The moment a memorandum of appeal has been presented, though out of time, there is an appeal under the provisions of Order 41, rule 1. [*Para.* 9.]

In granting an *ex parte* order of stay under section 151 in such circumstances, the Court is in no way dealing with the appeal itself and the provisions of Order 41, rule 1 (3), Civil Procedure Code, are in no way contravened. [*Para.* 11.]

Cases referred to :—

Ramayyan v. *Ashtamoorthi Namboodri*, (1962) K.L.T. 500 : (1962) K.L.J. 681 ; *Bayya Reddi* v. *Gopala Rao*, I.L.R. 57 Mad. 741: 66 M.L.J. 486: A.I.R. 1934 Mad. 303; *Krishnaswami Panikondar* v. *Ramaswami Chettiar*, (1918) 45 I.A. 25: I.L.R. 41 Mad. 412: 34 M.L.J. 63 : A.I.R. 1917 P.C 179 ; *Narendranath Dey* v. *Suresh Chandra Dey*, (1932) 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.) : 63 M.L.J. 329 (P.C.): A.I.R. 1932 P.C. 165; *Nanda Kishore Singh* v. *Ram Golam Sahu*, (1913) I.L.R. 40 Cal. 955; *Nityamoni Dasi* v. *Madhu Sudan Sen*, (1911) I.L.R. 38 Cal. 335; *Ankalu Reddi* v. *Chinna Ankalu Reddi*, (1943) 2 M.L.J. 557: A.I.R. 1944 Mad. 161.

Petition praying that in the circumstances stated therein and in the affidavit filed

*C.M.P. No. 8236 of 1973, C.M.P. No. 719 of 1972 in Appeal S.R. No. 1649 of 1970.

7th September, 1973.

therewith the High Court will be pleased to stay all further proceedings in O.S. No. 703 of 1964 on the file of the City Civil Court (VI Assistant Judge) Madras pending C.M.P. No. 719 of 1972 presented to the High Court to excuse the delay in re-presentation of Appeal S.R. No. 81649/70 sought to be preferred to the High Court against the decree of the City Civil Court (VI Assistant Judge) Madras dated 8th September, 1969 and made in O.S. No. 703 of 1964.

K. Hariharan for *P. S. Chinnappan*, for Petitioner.

The Order of the Court was delivered by

Venkataraman, J.—The petitioner herein Gouse Bi, was the first defendant in O.S. No. 703 of 1964 on the file of the City, Civil Court, Madras. It was a suit for partition. A decree was passed on 8th September, 1969 overruling a contention that some property belonged to her absolutely as *mahar*. She filed a memorandum of appeal in this Court, but, since it was out of time, she filed a petition, C.M.P. No. 719 of 1972, under section 5 of the Limitation Act to excuse the delay in filing the appeal. Pending disposal of C.M.P. No. 719 of 1972, she has filed C.M.P. No. 8236 of 1973 for stay of further proceedings in O.S. No. 703 of 1964 on the file of the City Civil Court, Madras.

2. So far as we are aware, till recently, the uniform practice of this Court was to grant interim stay, if the Court felt that it would be expedient to grant stay, and notice would be ordered of the interim stay along with the notice in the application under section 5 of the Limitation Act. But in a recent decision, in C.M.P. No. 6420 of 1973, Paul, J., has decided that till the delay is excused under section 5 of the Limitation Act, the Court cannot be said to be seized of the appeal and that the Court cannot pass any interlocutory orders. The office therefore returned the petition, C.M.P. No. 8236 of 1973, drawing the attention of the petitioner to the said decision of Paul, J. and asking her how in view of that decision the present petition is maintainable. The point has been argued before us by the petitioner's learned Counsel Mr. Hariharan. He contends that the decision of Paul, J. is wrong and that this Court has jurisdiction to grant stay if is thinks fit to do so on merits.

3. As we observed, so far as we are aware, it had been the uniform practice of this Court, till the decision of Paul, J., to grant interim stay, if the Court thought fit to do so. However, since Paul, J., has decided otherwise, it is necessary to go into the matter fully.

4. Paul, J., has relied on the decision of the Travancore High Court in *Ramayyan* v. *Ashtamoorthi Namboodri*[1], which is cited in Mulla's Civil Procedure Code, under Order 41, rule 1 as authority for the following commentary:

> "It has been held that when an appeal is presented out of time and a petition is filed for excusing the delay, no interlocutory orders can be passed until the petition is ordered and the appeal is taken on file".

Paul, J., was not able to get at the decision. We have, however, been able to get the decision. It is a decision of T. C. Raghavan, J. In that case the suit of the plaintiff was dismissed for default. An application for restoration was dismissed. The plaintiff filed a civil miscellaneous appeal against that and also filed a regular appeal against the dismissal of the suit. Along with the regular appeal he filed an application to excuse the delay in filing the appeal, and he also filed an application for injunction. The District Judge granted the injunction. The defendant appealed to the High Court. The learned Judge set aside the decision of the District Judge, pointing out that the District Judge had overlooked the provisions of sub-rule 3 of Order 41, rule 1, which was in force in Travancore from June, 1959. That provision had been inserted in Madras even in 1921—*Vide* Fort St. George Gazette, dated 15th February, 1921, Part II, page 362. It is necessary to quote it in full:

> "When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appel-

1. (1962) K.L.T. 500 : (1963) K.L.J. 681.

lant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reason for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908, have been heard".

T. C. Raghavan, J., says that, if the Court does not dismiss the appeal under Order 41, rule 11 or on the ground that there is no ground for excusing the delay, it cannot deal with the appeal in any manner till after notice has been given to the respondent of the application under section 5 of the Limitation Act and his objections thereon have been heard. On such reasoning Raghavan, J. has held that the Court has no power to issue any interlocutory order till the petition under section 5 of the Limitation Act is allowed. He has sought support for this view from the decision of Madhavan Nair, J., in *Bayya Reddi* v. *Gopala Rao*[1]. In that case the plaintiff obtained a decree in the Court of the District Munsif in 1923. It was confirmed in appeal by the District Court on 20th April, 1925. The judgment-debtor preferred an appeal to the High Court, out of time. His application to excuse the delay was dismissed on 5th March, 1926. On that day the second appeal sought to be preferred was also dismissed in consequence. The decree-holder then filed an execution petition on 6th September, 1928. The judgment-debtor contended that the execution petition was out of time. The relevant statutory provision was Article 182 of the First Schedule to the Limitation Act, 1908, which provided a period of three years as follows:

"*Period of Limitation.*	*Time from which period begins to run.*
Three years	(1) The date of the decree or order, or
	(2) (where there has been an appeal) the date of the final decree or order of the appellate Court or the withdrawal of the appeal".

The contention of the judgment-debtor was that the appeal which was relevant was the appeal to the District Court, that the decree-holder had to file the execution petition within three years from 20th April, 1925, and that consequently the execution petition was out of time. The decree-holder, however, contended that he was entitled to take as the starting point 5th March, 1926. The question therefore before the learned Judge was whether there had been an appeal to the High Court. The learned Judge answered it in the negative. His main reason was that, whatever might have been the position before sub-rule (3) was added as a result of the decision of the Privy Council in *Krishnaswami Pani Kondar* v. *Ramaswami Chettiar*[1], the position after the rule was enacted was clear that there could not be said to be any appeal at all till the delay in filing the appeal was excused.

5. In the case before the Privy Council, which went up from this Court, a single Judge of this Court had, in accordance with the existing practice, excused the delay *ex parte*. Notice went thereafter of the appeal and at the hearing of the appeal an objection was taken that the appeal was out of time. This Court held that the appeal was out of time and dismissed the appeal. Their Lordships of the Privy Council observed:

"The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances, their Lord-

1. (1918) 45 I.A. 25 : 34 M.L.J. 63 : I.L.R. 41 Mad. 412 : A.I.R. 1917 P.C. 179.

1. I.L.R. 57 Mad. 741 : 66 M.L.J. 486 : A.I.R. 1934 Mad. 303.

ships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But, while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal".

6. It was a result of the above decision that sub-rule (3) was introduced in Madras, and a similar rule was introduced in Kerala in 1959. Madhavan Nair, J., took the view that in view of sub-rule (3) the appeal could not be admitted without the delay being excused and that, if the appeal was not admitted, there could be said to be no appeal within the meaning of Article 182 (2) of the Limitation Act, 1908.

7. Before proceeding further, it is necessary to quote Order 41, rule 5.

"5 (1). An appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of such final decree, if already made.

(2) Where an application is made for stay of execution of an appellate decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied,

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay; and

(*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application".

8. Now taking Order 41, rule 5 by itself, it is *prima facie* clear that the appellate Court may order stay of execution of the decree sought to be appealed from and may make an *ex parte* order of stay. There is no doubt that this is the appellate Court in this case. Two questions therefore arise: (*i*) whether it can be said that there has been no appeal at all, according to the view of Madhavan Nair, J., and Paul, J., till the application for excusing the delay under section 5 of the Limitation Act is allowed; and (*ii*) even if there could be said to be an appeal the moment a memorandum of appeal is filed irrespective of the fact that the appeal has been filed out of time, does Order 41, rule 1 (3) preclude the appellate Court from making an *ex parte* order of stay of execution of the decree sought to be appealed from. To put it differently, can it be said that, in making an *ex parte* order of stay, the appellate Court is dealing with the appeal in any way otherwise than by dismissing it under Order 41, rule 11 or on the ground that it is not satisfied as to the sufficiency of the reason for extending the period of limitation.

9. On the first question, it is relevant to note that Order 41, rule 1 (1) starts by saying. "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader", and sub-rule (3) itself opens by saying, "when an appeal is presented after the period of limitation prescribed therefor". These

provisions thus make it clear that, merely because a memorandum of appeal is presented after the period of limitation prescribed therefor, it does not cease to be an appeal. In fact, sub-rule (3) itself recognizes that it is an appeal, because it is on that footing it says, "and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it.)" Thus it is clear from the provisions of Order 41, rule 1 itself that the moment a memorandum of appeal has been presented though out of time—there is an appeal. This position has also been made clear by the decision of the Privy Council in *Narenda Nath Dey* v. *Suresh Chandra Dey*[1]. In that case there was a mortgage suit in which the learned Subordinate Judge delivered judgment on 24th June, 1920. The decree was drawn up on 2nd August, 1920, but properly dated as 24th June. On 27th August, 1920, the decree-holder, Madan Mohan, presented an application to the High Court purporting to be an appeal from the 'order' of the Subordinate Judge of 24th June, 1920, and alleging, what was clearly untrue, that no decree had been drawn up. The appeal, though irregular in form as not being an appeal against the decree of the Subordinate Judge and being insufficiently stamped for that purpose, was admitted and heard in due course by the Bench. The appeal was eventually dismissed on the ground of irregularity and upon merits. The dismissal was embodied in a decree of the High Court dated 24th August, 1922. An execution petition was presented by the parties entitled under the decree for execution sale of the mortgaged properties. It was opposed by some of the judgment-debtors on the ground of limitation. The question was whether there was an appeal to the High Court, within the meaning of Article 182 of the Limitation Act. The Subordinate Judge held that the petition was not time-barred. But the High Court took the opposite view and gave three reasons, the first of which was that "Madan Mohan's application of 27th August, 1920, was by reason of its irregularity, not an appeal at all". Their Lordships of the Privy Council, differing from the High Court, held:—

"In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it".

10. In the same way, in our opinion, particularly having regard to the wording of Order 41, rule 1, as pointed out already there is an appeal to this Court, even though it has not been presented in time and it might even turn out eventually that the application for excusing the delay is not allowed. Madhavan Nair, J., expressed the view that the decision of the Privy Council did not apply to the facts of the case before him. With respect, we differ.

11. Now we come to the second question whether Order 41, rule 1 (3) forbids us to pass an *ex parte* order of stay. In answering the question we must remember at the outset how in some cases the very purpose of the appeal may be frustrated and injustice may result if such an *ex parte* order is not passed. Quite often, particularly in these days, when it is difficult to get accommodation in trains or even in buses and there is even strike in the railways and bus transport, a party may not be able to come to Madras and file an appeal in time and the chances are that the application for excusing the dealy would be allowed. But, in the meantime, if the appellant's house is pulled down as a result of the lower Court's decree, irreparable harm would be caused to him and it would be no consolation to him to be told that he would be given restitution in money, if his appeal is eventually allowed. It is easy to imagine other such instances of substantial loss within the meaning of Order 41, rule 5 or irreparable harm to the appellant. Yet, on the reasoning of Paul, J., the Court would be powerless to pass any order and prevent such substantial loss or irreparable harm. It is no use saying that hard cases make bad

1. (1932) 59 I.A. 283 : 63 M.L.J. 329 : I.L.R. 60 Cal. 1 : A.I.R. 1932 P.C. 165.

law, because such instances of substantial loss or irreparable harm are quite common and likely to happen often if the decree is not stayed. Further, that maxim would have application only if the law is unequivocal, but where, as in this case, Order 41, rule 5 enables the Court to pass an *ex parte* order of stay, and the interests of justice do require it, we should not construe Order 41, rule 1 (3) so as to make the provisions of Order 41, rule 5 a dead letter, and so as to result in injustice. It is possible to give an interpretation which would reconcile both Order 41, rule 1 (3) and Order 41, rule 5, namely, that when the Court passes an *ex parte* order of stay, it does not deal with the appeal in any manner, but is merely maintaining the *status quo*. It must be remembered that the reason for the introduction of Order 41, rule 1 (3) was the decision of the Privy Council in *Krishnasami Panikondar* v. *Ramasami Chettiar*[1], which again shows that the reason why their Lordships suggested that the question of excusing the delay should be disposed of first was only to prevent needless expenditure of printing records or typing voluminous records and engaging Counsel paying heavy fees, which would be unnecessary if the delay were not to be excused. This being the object underlying the introduction of the rule, we need not extend it so as to throttle the exercise of the power of the appellate Court under Order 41, rule 5.

12. We are firmly of the opinion that Order 41, rule 5 itself enables us to pass an *ex parte* order of stay; but, if necessary, we are prepared to say that we can exercise the power of stay by virtue of our inherent powers under section 151, Civil Procedure Code. The principle in these cases has been enunciated in several cases, and it is sufficient to refer to some of them. In *Nanda Kishore Singh* v. *Ram Golam Sahu*[2], it was held by that eminent Judge, Mookerjee, J., that the High Court, in exercise of its inherent powers, could make an order of stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the judicial Committee for Special Leave to appeal to His Majesty in Council, though the case was not expressly covered by the rules. The learned Judge pointed out that, if the proposed application for Special Leave was granted by the Judicial Committee, the High Court would be competent to stay the proceedings under the authority of the decision of the Privy Council. He proceeded to observe:

"The Court, therefore ought now to act in aid of a possible order for stay that may hereafter have to be made. If the contrary view is taken, what is the result? Assume that the present application for stay is refused, and the decree-holders permitted to sell the mortgaged properties; the application for Special Leave is granted by the Judicial Committee and an application then made to this Court by the judgment-debtors for stay of proceedings. Are we to say that our action has already been paralyed, that we are powerless to grant relief and that the application is infructuous? I am strongly of opinion, after most anxious considerations of the subject, that the Court should not tolerate such a result, and, as I have shown, the position may be avoided by the recognition of sound judicial principles........ It is fairly obvious that, if the contention of the decree-holders were to prevail, the gravest injustice might be done to litigants. As application to the Judicial Committee for Special Leave to appeal to His Majesty in Council must necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of the utmost expedition, in the preparation and transmission of papers........If meanwhile his properties are allowed to be sold up by the decree-holders on the theory that this Court is powerless to interfere, not only may an application for stay after the grant of the Special Leave, as contemplated by the Judicial Committee in *Nityamoni Dasi* v. *Madhu Sudan Sen*[1], become infructuous, but the appeal admitted by Special Leave of their Lordships of the Judicial Committee may turn out to be wholly illusory and ineffectual. It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree or weakens its effect; the stay is granted on the principle that the

1. (1918) I.L.R. 41 Mad. 412 : 34 M.L.J. 63 : 45 I.A. 25 : A.I.R. 1917 P.C. 179.
2. (1913) I.L.R. 40 Cal. 955.

1. (1911) I.L.R. 38 Cal. 335.

parties should, if the circumstances justify the adoption of such a course, be retained in *status quo* till the validity of the decree has been tested in the Court of ultimate appeal. The exercise of the inherent power of the Court should thus be widened to aid the administration of justice and not unduly restricted so as to cause needless hardship to litigants and a possible failure of justice".

13. Holmwood, J. was not prepared to differ on the general principles, though he stated that in that particular case the use of the inherent power would be an abuse of the process of the Court.

14. As applied to the present case, the observations might be translated thus. If this Court were to excuse the delay then it would become clothed with power to stay execution, if necessary on suitable terms. The grant of stay at this stage is only in aid of a possible order of stay that may hereafter have to be made. Another aspect is that, if such an order is not made, irreparable harm might be caused to the appellant.

15. The same principle was reiterated by another Bench of the Calcutta High Court in *Ramendra Narayan Roy* v. *Bibhabati Debi*[1].

16. There is also a decision of Kuppuswami Ayyar, J., in *Ankalu Reddi* v. *Chinna Ankalu Reddi*[2], that the power of stay can be exercised under section 151 irrespective or Order 41, rule 5. There was an *ex parte* preliminary decree on a mortgage suit. The defendant's application under Order 9, rule 13 to set aside the *ex parte* decree was dismissed. He filed an appeal against that order, and an application for interim stay of the passing of the final decree. Order 41, rule 5 did not in terms apply, but the learned Judge held that he could exercise the powers under section 151 of the Code of Civil Procedure. We need hardly make it clear that by the exercise of such inherent powers under section 151, Civil Procedure Code, we are not in any way dealing with the appeal itself and are not therefore contravening in any way the specific provisions of Order 41, rule 1 (3), Civil Procedure Code.

17. We therefore hold that we have jurisdiction to grant an *ex parte* order of stay under Order 41, rule 5, and, if necessary, under section 151 of the Code of Civil Procedure.

V.S. ——— *Ordered accordingly.*

1. (1941) 45 C.W.N. 1023 : A.I.R. 1942 Cal. 488.
2. (1943) 2 M.L.J. 557 : A.I.R. 1944 Mad. 161.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—*S. Natarajan, J.*

T. Balakrishna Mehta .. *Appellant**

v.

M/s. Burmah Shell Oil Storage and Distributing Company of India Limited, Burmah Shell House, Esplanade, Madras-1. .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922) as amended by Act (XIX of 1955)—Lease whether prior to the Act or subsequent to the Act—Registered lease coming into existence after the Act—Site handed over prior to Act—Term of ten years—Computation from date of handing over—Payment of rent from date of handing over—Tenancy created before the Act.

The possession of the s it site was delivered in June, 1956 and the registered lease deed itself came into existence only in October, 1956. But in a letter dated 16th June, 1956, under which the tenant acknowledged taking possession of the site, the specific recital was that the site has been handed over/taken over effective from 1st September, 1955 and the letter was signed by both the parties. The lease deed provided that the lessee was to hold the site on lease from 1st. September, 1955 for a period of ten years. The lessee paid rents for the site from 1st September, 1955 onwards.

Held, The tenancy commenced prior to the Act as amended and the lessee would be entitled to the benefits of the Act. [*Para.* 6.]

(B) *Madras City Tenants' Protection Act (III of 1922) as amended by Act (XIX of 1955)*

* A.A.O. No. 239 of 1972. 2*nd November*, 1973.

—*No superstructure built prior to Act but built subsequently on the leased site—Tenant, not entitled to benefit under the Act.*

"Where there were no superstructures on the lease site when the Act as amended came into force and the superstructures were built by the tenant after the coming into force of the Act, the tenant will not be entitled to any protection under the Act. [*Para.* 15.]

Cases referred to:—

Nayar Varada Pillai v. *Ghulam Dastagir*, (1945) 2 M.L.J. 190 : A.I.R. 1946 Mad. 11; *Ganesa Mudaliar* v. *Chellammal*, (1961) 1 M.L.J. 107 : I.L.R. (1960) Mad. 1011: 39 I.T.R. 660: (1960) M.L.J. (Crl.) 808: A.I.R. 1961 Mad. 21 ; *Annamalai and Company Limited* v. *Sibgathulla Sahib*, (1955) 2 M.L.J. 653 : I.L.R. (1956) Mad. 251: A.I.R. 1956 Mad. 98; *Nagamma Bai* v. *Thangavelu Naicker*, (1973) 86 L.W. 388; *Vajrapani Naidu* v. *New Theatres Carnatic Talkies Limited*, (1965) 1 S.C.J. 368 : (1964) 6 S.C.R. 1015 : (1965) 1 An.W.R. (S.C.) 47 : (1965) 1 M.L.J. (S.C.) 47: A.I.R. 1964 S.C. 1440; *M. H. P. Fund Ltd.* v. *Subramania*, (1971) 1 S.C.J. 545 : (1971) 1 M.L.J. (S.C.) 94 : (1971) 1 An.W.R. (S.C.) 94 : A.I.R. 1970 S.C. 1683; *Venkataswami Naidu* v. *Narasram Naraindas*, (1965) 2 S.C.J. 8?0 : (1966) 1 An.W.R. (S.C.) 1: (1966) 1 M.L.J. (S.C.) 1: (1966) 1 S.C.R. 110: A.I.R. 1966 S.C. 361; *V. S. Mudaliar* v. *N. A. Raghavachari*, (1969) 2 S.C.R. 158 : (1969) 1 An.W.R. (S.C.) 90 : (1969) 1 M.L.J. (S.C.) 90 : (1969) 1 S.C.J. 760 : A.I.R. 1969 S.C. 435 ; *Sundareswarar Devasthanam* v. *Marimuthu*, 76 L.W. 381 : I.L.R. (1963) Mad. 1054 : A.I.R. 1963 Mad. 369.

Appeal against the order of the City Civil Court (IV Asst. Judge) Madras dated 15th December, 1971 and made in I.A. No. 5752 of 1966 in O.S. No. 1381 of 1966.

N. Sivamani and *N. Krishna Mitra*, for Appellant.

N. C. Raghavachari and *N. S. Varadachari*, for Respondent.

The Court made the following

ORDER.—The appellant herein is the respondent in I.A. No. 5752 of 1966 in O.S. No. 1381 of 1966 on the file of the Court of the 5th Assistant Judge, City Civil Court at Madras. In a suit for ejectment instituted by the appellant in O.S. No. 1381 of 1966, the tenant *viz.*, the respondent herein set up the plea that he was entitled to the benefits conferred by the Madras City Tenants' Protection (Amendment) Act, 1955 XIX of 1955), hereinafter referred to as the Act and filed I.A. No. 5752 of 1966 for the appointment of a Commissioner to determine the market value of the suit land. Overruling the objection of the appellant that the respondent was not entitled to the benefits of the Act, the learned 5th Assistant Judge has ordered the appointment of a Commissioner and hence this appeal by the aggrieved plaintiff.

2. To appreciate the contentions of Mr. N. Sivamani, learned Counsel for the appellant, a concise history of the case has got to be made. The suit is in respect of a site in 38-B, Mount Road, Madras and in which the respondent has installed tanks for storing petroleum and mechanised pumps for the distribution of petrol. Under Exhibit B-1 dated 6th September, 1955, the respondent wrote to the appellant stating that they were agreeable to take the site on lease, that the rent will become payable and the lease would commence from the date they occupy the site, that the appellant may fill up and sign the enclosed draft lease deed and return the same so as to enable the respondent to prepare a regular lease deed on stamp paper. It is also mentioned in Exhibit B-1 that the commencement of the lease and the occupation of the site will be after the respondent obtained necessary sanctions from the various authorities like the Inspector of Explosives, the Commissioner of Police, and the Corporation of Madras. On 9th September, 1955 under Exhibit B-2 the appellant replied to Exhibit B-1 by stating that the rent for the site should be Rs. 400 per month and that the rent should be paid to him from 1st September, 1955, as he had been keeping the site in reserve for the respondent in spite of offers of lease from other quarters. Under Exhibit B-4 dated 27th October, 1955, the respondent informed the appellant that they have agreed to pay a rent of Rs. 400 for the site and that they were

entitled to surrender the site without any obligation on their part if they did not succeed in obtaining necessary local sanctions from various authorities. Under Ex. B-6 dated 9th January, 1956, the appellant called upon the respondent to finalise the lease transaction without further delay as he was getting offers for the site from other parties. To this, the respondent sent a reply, Exhibit B-7 dated 12th January, 1956 stating that they were awaiting the police sanction for the installation of petrol pumps in the suit site and that they will be finalising the lease only after receiving all the local sanctions. On 2nd April, 1956 under Exhibit B-8 the appellant called upon the respondent once again to finalise the lease without further delay and giving reasons also therein for this request. On 4th April, 1956, under Exhibit B-9 the respondent informed the appellant that all local sanctions except the Corporation building permit have been received and that they were making arrangements to finalise the lease agreement. The appellant on 18th April, 1956 under Exhibit B-10 called upon the respondent to pay him the advance rent of Rs. 4,800 for a period of one year and also rent for 8 months from 1st September, 1955 to 30th April, 1956. On 21st April, 1956 the respondent sent a cheque for Rs. 8,000 which comprised of rent advance of Rs. 4,800 and rent of Rs. 3,200 from 1st September, 1955 to 30th April, 1956 and this was acknowledged by the appellant under Exhibit B-14 dated 25th April, 1956. On 16th May, 1956 the appellant informed the respondent that the rent for May had fallen due, that he was likely to be away from the city for some time and that therefore the necessary formalities regarding the lease may be completed at an early date. On the same date, the respondent wrote Exhibit B-13 and informed the appellant that the lease deed was being got ready and that they would advise the appellant in due course, the exact date for the registration. Ultimately, the site was handed over to the respondent on 16th June, 1956. Exhibit A-1 registered lease deed was executed by both the parties in the month of October, 1956 and the relevant clause therein with which only we are now concerned is to the following effect. "To hold the same to the lessee from the first day of September, 1955 for the term of 10 years paying therefor during the said term the monthly rent of Rs. 400. The lease also provides an option in favour of the respondent to renew the lease for a further period of 10 years on the same rent. The advance rent of Rs. 4,800 has to be adjusted by the lessee against the rent payable for the last year of the tenancy.

3. Taking the stand that he was entitled to terminate the lease and recover possession of the leased site the appellant filed the suit for ejectment. The respondent appears to have raised various defences in the suit *inter alia* contending that he was entitled to an option for a renewal of the lease for a further period of 10 years and that he was also a tenant within the meaning of section 2 (4) (1) of the Act. It is in pursuance of this last defence the respondent filed I.A. No. 5752 of 1966 for a Commissioner being appointed to determine the market value of the suit land.

4. The learned 5th Assistant Judge has held that though possession of the site was handed over only in June, 1956 and the lease deed itself came to be executed only in October, 1956, nevertheless the tenancy must be deemed to have come into existence with effect from 1st September, 1955 in view of the recitals in the possession receipt and the lease deed and in view of the agreement reached between the parties for rent being paid for the leased site with effect from 1st September, 1955, itself.

5. The Madras City Tenants Protection Act, 1921 (III of 1922) as amended and enacted as the Madras City Tenants' Protection (Amendment) Act, 1955 (Madras Act XIX of 1955) came into force on 12th September, 1955 and therefore one of the crucial factors for consideration in the controversy between the parties is as to when exactly the tenancy in favour of the respondent was created. It is therefore on this aspect of the matter that Mr. N. Sivamani focussed the first portion of his argument.

6. Section 1 (3) of the Act reads as follows: "This Act shall apply in the City of Madras, only to tenancies of land created before the commencement of the

Madras City Tenants' Protection (Amendment) Act, 1955, and in any municipal town or village to which this Act is extended by notification under sub-section (2), only to tenancies created before the date with effect from which this Act is extended to such town or village". The argument of Mr. Sivamani in support of his contention that the respondent cannot be deemed to be a tenant within the meaning of the Act was that though the rent was paid, as per the agreement reached between the parties, with effect from 1st September, 1955 onwards, the actual handing over possession of the site was only in June, 1956 and the registered lease deed between the parties was entered into only in October, 1956 and as such the respondent cannot be heard to say that the tenancy in his favour was created before the commencement of the Act and that therefore he is entitled to the benefits conferred under section 3 or 9 or 11 of the Act. On the other hand, Mr. N. C. Raghavachari, learned Counsel for the respondent placed reliance upon the fact that it was at the instance of the appellant himself that the lease period was made effective from 1st September, 1955, that the 10 year period of lease provided for under Exhibit A-1 comes to a termination on 31st August, 1965, that as such the lease period must be held to be effective and operative from 1st September, 1955, that the respondent had actually paid rent for the site in question from 1st September, 1955 and therefore urged that the appellant was estopped from now contending that the tenancy was created subsequent to the coming into force of the Act. On a consideration of the matter, I find that the argument of the learned Counsel for the appellant in this behalf cannot be sustained or upheld. It is no doubt true that possession of the site has been delivered only in June, 1956 and the registered lease deed itself has come in to existence only in October, 1956. Notwithstanding these features the tenancy between the parties must be deemed to have been in existence from 1st September, 1955 onwards for more than one reason. In the letter dated 16th June, 1956 under which the respondent has acknowledged taking possession of the suit site, the specific recital is that the site has been "handed over, taken over effective from 1st September, 1955" and this letter has been signed by both the parties. Further, more, as already stated, Exhibit A-1 also makes it clear that the lessee was to hold the site on lease from 1st September, 1955 for a period of 10 years ending on 31st August, 1965. Over and above these things, there is also irrefutable evidence to show that the respondent has been making payment towards rent for the site from 1st September, 1955 onwards itself. On account of all these factors it is no longer possible for the appellant to contend that the tenancy in favour of the respondent was created subsequent to the Act and therefore the respondent cannot claim any protection under the Act.

7. The second contention of Mr. Sivamani related to the construction of the superstructures on the suit site subsequent to the coming into force of the Act. The argument advanced by the learned Counsel was that it is only those tenants who had put up buildings or superstructures prior to the commencement of the Act who will be entitled to claim the benefits of sections 3 and 9 of the Act and the respondent in this case, having admittedly put up the superstructures only after June, 1956 cannot either claim payment of compensation for the superstructures under section 3 of the Act or claim a right in his favour to purchase the leased land on which he has put up the superstructures. In advancing arguments on this aspect of the matter, Mr. Sivamani also contended that due regard must be had to the preamble of the Act which made it clear that the Legislature intended to give protection only to those tenants who had constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land. Reliance was placed by Mr. Sivamani on the terms of the lease deed which laid down that the lease was only for a duration of 10 years, that it was a terminable lease thereafter and that as such the respondent cannot be deemed to be a person who had constructed the superstructures on the suit land in the hope that he would not be evicted so long as he paid a fair rent for the land.

8. Mr. N. C. Raghavachari, learned Counsel for the respondent sought to nullify the contentions of the appellant

by stating that the payment of compensation referred to in section 3 can only have a reference to compensation in respect of buildings which were in existence at the time of the filing of the suit for ejectment and that the Act did not require the building or superstructure to be in existence even at the time of the commencement of the Act in order to enable a tenant to claim protection under the Act. He also argued that the rights and liabilities of the parties must be determined according to the clear terms of the section and that the object of the legislation as reflected in the preamble cannot be made use of to curtail the rights of a tenant.

9. Before going into a consideration of the rival contentions of the parties I shall make reference to some decisions which have dealt with questions arising under the Act under various circumstances.

10. The Privy Council had to consider in *Ranganatham Chetti v. Ethirajulu Nayudu*[1], the question as to whether a tenant whose lease had expired on 30th September, 1922 and who continued in possession and obtained on 1st February, 1923 a new lease for 10 years from 1st October, 1922 with a stipulation for payment of a higher rent was entitled to the Madras City Tenant's Protection Act (III of 1922). The Privy Council held that though the physical possession of the lessee was continuous, his possession after 1st October, 1922 was attributable to the new tenancy formally embodied in the lease executed on 1st February, 1923. The above decision of the Privy Council was interpreted by this Court in several cases to mean that if there had been no change in the terms of the tenancy, the tenant would be entitled to claim continuity of tenancy, even if he had executed a fresh lease after the coming into force of the Act. In *Nayar Varada Pillai* v. *Ghulam Dastagir*[2]. and *Ganesa Mudaliar* v. *Chellammal*[3], it has been held that where a tenant continues on the land on the same conditions as before, the mere fact that a fresh lease deed was executed by him does not disentitle him from claiming the benefits of the Act.

11. A Bench of this Court presided by Rajamannar, C.J. in *Annamalai and Company Limited* v. *Sibgathulla Sahib*[1], had to consider the question as to whether a tenant who was in occupation of a vacant piece of land was entitled to the benefits of the Act by virtue of earlier proceedings between his predecessor-in-interest and the landlord wherein the right of the tenant was upheld. The suit property therein formed part of a bigger block of land and there was a prior suit for eviction against the lessees of the entire block of land, it was held in that case that the lessees were entitled to protection under the Madras City Tenant's Protection Act as there were buildings on portions of that block. Subsequently, the entire block of land was purchased by the plaintiff and portions of the land came to be in the occupation and enjoyment of the descendants of the lessee as a result of partition and defendants in the subsequent suit were alienees from such descendants of separate portions. In the suit by the plaintiff for recovery of possession of pieces of vacant land from the defendants, the Bench held that the prior decision did not operate as a *res judicata* and that in respect of those defendants who were in occupation of only vacant pieces of land they were not entitled to the protection afforded by the City Tenants Protection Act. Following this decision Ismail, J., has held in *Nagamma Bai* (alias) *Leela Bai* v. *Thangavelu Naicker*[2], that a defendant who had removed the hut which he had put up earlier and started putting up a new hut after the coming into force of the Act was not entitled to the benefits of either section 3 or 9 or 11 of the Act.

12. The scope and effect of section 12 and the proviso contained therein came up for consideration by the Supreme Court in the following cases. In *Vajrapani Naidu* v. *New Theatres Carnatic Talkies Ltd.*[3],

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1. I.L.R. (1940) Mad. 172: 67 I.A. 25: (1940) 1 M.L.J. 24: A.I.R. 1940 P.C. 17.
2. (1945) 2 M.L.J. 190: A.I.R. 1946 Mad. 11: C.C.A. No. 107 of 1950: (1954) M.W.N. (Short Notes) p. 100.
3. (1961) 1 M.L.J. 107: I.L.R. (1960) Mad. 1011: 39 I.T.R. 660: (1960) M.L.J. (Crl.) 808: A.I.R. 1961 Mad. 21.

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1. (1955) 2 M.L.J. 653: I.L.R. (1956) Mad. 251: A.I.R. 1956 Mad. 98.
2. (1973) 86 L.W. 388.
3. (1965) 1 S.C.J. 368. (1964) 6 S.C.R. 1015: (1965) 1 An.W.R. (S.C.) 47: (1965) 1 M.L.J (S.C.) 47: A.I.R. 1964 S.C. 1440.

the Supreme Court held that the stipulations not protected by section 12 are only those in writing registered and relate to erection of building such as restrictions about the size and nature of the building constructed, the building materials to be used therein and the purpose for which the building is to be utilized. In a later case, in *M. H. P. Fund Ltd.* v. *Subramania*[1], the Supreme Court held that the decision in *Vajrapani Naidu* v. *New Theatres Carnatic Talkies Ltd.*[2], did not lay down that only stipulations regarding restrictions about the size, nature of the buildings constructed, the building materials to be used therein and the purpose for which the building is to be utilised, exhaust completely all the stipulations that are protected by the proviso to section 12 and that they are only illustrative examples of the stipulation. In that view, the Supreme Court held that a term in a registered lease deed, in and by which the lessee of a vacant piece of land, agreed to surrender on the termination of the lease, not only the land but also the superstructure put up by him for the price agreed to between the parties and provided for in the lease is "a stipulation made by the tenant in writing registered as to the erection of buildings" so as to attract, in favour of the landlord, the proviso to section 12 of the Act.

13. The question as to whether a tenant who had covenanted in an unregistered lease deed that the tenant was not to raise any building but who had erected a building in disregard of the stipulation was entitled to the benefits of the Act and whether the covenant in the unregistered lease deed would come within the proviso of section 12 came up for consideration before the Supreme Court in *Venkataswami Naidu* v. *Narasram Naraindas*[3]. The Supreme Court held that inasmuch as the lease deed was an unregistered one the conditions laid down in the proviso to section 12 were not satisfied and therefore the stipulation cannot be construed to the detriment of the tenant. In a later case, in *V. S. Mudaliar* v. *N. A. Raghavachary*[1], a similar stipulation entered into in a registered lease deed between the tenant and the landlord was held to be operative in favour of the landlord and the Court therefore held that the proviso to section 12 was attracted and the tenant cannot claim protection under the Act.

14. All these decisions though cited at the bar do not offer any solution for the controversy between the parties in the instant case. The argument of Mr. Sivamani that a right to which a tenant would be entitled under the Act must be determined with reference to the object of the Act as enunciated in the preamble cannot however be conceded. It has been observed in *Venkataswami Naidu* v. *Narasram Naraindas*[2], that the preamble cannot operate to annul any section and that though a preamble is a key to the interpretation of a statute it is not ordinarily an independent enactment conferring rights or taking them away and cannot restrict or widen the enacting part which is clear and unambiguous. Therefore, the conduct of the respondent in putting up the superstructure notwithstanding his awareness that the lease was a terminable one cannot disentitle the respondent to the benefits conferred under sections 3 and 9 of the Act if he were otherwise entitled to the same.

15. It now remains for me to consider the second main argument of Mr. Sivamani *viz.*, that admittedly there were no superstructures on the leased site when the Act came into force and the superstructures having been built by the tenant after the coming into force of the Act, he will not be entitled to any protection under the Act. Though this question has not directly arisen for consideration in any reported case, Mr. Sivamani has invited my attention to two decisions of this Court which lend support to his view. The first case is a

1. (1971) 1 S.C.J. 525 : (1971) 1 M.L.J. (S.C.) 94 : (1971) 1 An.W.R. (S.C.) 94 : A.I.R. 1970 S.C. 1683.
2. (1965) 1 S.C.J. 368 : (1965) 6 S.C.R. 1015 : (1965) 1 An.W.R. (S.C.) 47 : (1965) 1 M.L.J. (S.C.) 47 : A.I.R. 1964 S.C. 1440.
3. (1965) 2 S.C.J. 880 : (1966) 1 M.L.J. (S.C.) 1 : (1966) 1 An.W.R. (S.C.) 1 : (1966) 1 S.C.R. 110 : A.I.R. 1966 S.C. 361.

1. (1969) 1 An.W.R. (S.C.) 90 : (1969) 1 M.L.J. (S.C.) 90 : (1969) 1 S.C.J. 760 : (1969) 2 S.C.R. 158 : A.I.R. 1969 S.C. 435.
2. (1965) 2 S.C.J. 880 : (1966) 1 An.W.R. (S.C.) 1 : (1966) 1 S.C.R. 110 : (1966) 1 M.L.J. (S.C.) 1 ; A.I.R. 1966 S.C. 361.

decision by Ramachandra Iyer, C.J. and Ananthanarayanan, J., in *Sundareswarar Devasthanam* v. *Marimuthu*[1]. The principal questions that arose for consideration in that case were with respect to the applicability of section 9 of the Madras City Tenants Protection Act, 1921, to a property owned by a Hindu religious institution over which the trustee or the manager has only a qualified power of disposal and the second as to the true construction of section 47 of the Presidency Small Cause Courts Act of 1882. Dealing with the facts of that case, the Bench has held that in order to attract the provisions of the Act, the tenant must have put up a superstructure prior to the date of the Act. Following this decision Ismail, J., has held in S.A. No. 901 of 1968 and C.R.P. No. 1338 of 1968 as follows: "The finding of the Courts below that the superstructure was put up by the appellant-petitioner subsequent to 29th June, 1955, is a finding on a question of fact and has been arrived at after referring to every one of the pieces of evidence adduced before the Court. In view of this, that finding will have to stand and its correctness cannot be canvassed in the second appeal. Mr. Chandramouli, having regard to this position alone, sought to argue that the appellant will be entitled to the protection of the Act even though he had put up the superstructure after the extension of the Act to the Madurai Town. However, a Bench of this Court in *Sree Sundareswarar Devasthanam* v. *Marimuthu*[1], has proceeded on the basis that the protection will be available to a tenant only if he had put up the superstructure prior to the coming into force of the Act or the extension of the Act as the case may be. That being a decision of a Bench, it is binding on me even though the point did not directly arise in that judgment. Following that judgment, it must be held that the appellant-petitioner is not entitled to the protection of the Act because the superstructure was put by him subsequent to the extension of the Act to the city in question". Having regard to the decision of the Bench and the manner in which it has been interpreted by Ismail, J., I am of opinion that I am also bound by the view taken by the Bench and consequently the respondent in this case who has admittedly put up the superstructure subsequent to his taking possession of the site in June, 1956 will not be entitled to claim any benefit under the Madras City Tenants Protection (Amendment) Act, 1955. The learned 5th Assistant Judge has placed reliance on the decision of the Supreme Court in *Venkataswami Naidu* v. *Narasram Naraindas*[1], to come to the conclusion that the respondent is entitled to the benefits of the Act, but he has failed to consider the contention of the appellant that the superstructure on the leased site was only built subsequent to the coming into force of the Act. The Supreme Court case referred to above did not deal with this aspect of the matter, but only dealt with the question as regards the validity of a covenant made by a tenant in the lease deed restricting his rights to put up any building in the vacant site.

16. In conclusion, as a result of the decisions of this Court referred to by me earlier, I hold that the respondent is not entitled to any benefits under the Act and consequently the order of the 5th Assistant Judge holding an opinion to the contrary and ordering the appointment of a Commissioner cannot be sustained. The appeal is therefore allowed and the order of the 5th Assistant Judge is set aside. The trial of the suit will be proceeded with as regards the other contentions which arise for consideration in the suit. There will be no order as to costs.

V.S. ——— *Appeal allowed.*

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1. 76 L.W. 381 : I.L.R. (1963) Mad. 1054 : A.I.R. 1963 Mad. 369.

1. (1965) 2 S.C.J. 880 : (1966) 1 M.L.J. (S.C.) 1 : (1966) 1 An.W.R. (S.C.) 1 : (1966) 1 S.C.R. 110 : A.I.R. 1966 S.C. 361.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*T. Ramaprasada Rao, J.*

P. Chandrasekharan .. *Petitioner**

v.

The Bar Council of Tamil Nadu represented by its Secretary, High Court Buildings, Madras-2 and others .. *Respondents.*

Advocates Act (*XXV of* 1961), *sections* 58-AA, 17—*Extension to Pondicherry—Persons in Pondicherry entitled to be enrolled as Advocates by the Bar Council of Tamil Nadu—Requisite qualification—Enrolment of an Advocate—Secretary of the Bar Association of Pondicherry—Not an aggrieved person.*

If a person had the requisite qualifications to enter into one or other of the classes of Advocates delineated in the *Arrete* (of Pondicherry), then such entitlement *per se* would enable him to seek entry in the roll of Advocates kept by the Bar Council (of Tamil Nadu) under section 17 of the Advocates Act of 1961.

A person who had the requisite qualifications to enter as a probationary Advocate need not necessarily take steps to enrol himself as such to gain entitlement under section 58-AA (1) and move the Bar Council of Tamil Nadu to include him in the list maintained by the latter Council under section 17 of the Advocates Act. As long as a person had the legal qualifications then he would be entitled as a matter of right and particularly because of the statutory fiction to gain admission into the list of Advocates of this State by enrolling himself through the Bar Council of Tamil Nadu.

[*Para.* 6.]

The Secretary of the Bar Association of Pondicherry cannot prevent the expansion of the list of Advocates as there is no such prohibition as to number as was contemplated by the colonies under the *Arrete.* No personal right of the Secretary of the Bar Association of Pondicherry is affected by the enrolment of a person by the Bar Council of Tamil Nadu. Even if there is any irregularity in the matter of enrolment by the Bar Council of Tamil Nadu, it is for other authorities, other than the Secretary of the Bar Association of Pondicherry who should seek to correct the act of the Bar Council of Tamil Nadu. [*Para.* 8.]

Case referred to :

Sunil Kumar v. *State of West Bengal,* A.I.R. 1963 Cal. 614.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *mandamus* restraining the second Respondent in each of the petitions from practising the profession of law in the Union Territory of Pondicherry and restraining the first Respondent in both the petitions from so permitting the second respondent in each of the petitions to practice.

K. K. Venugopal and *P. Chidambaram,* for Petitioner.

A. Balasubramaniam, for Respondent.

The Court made the following

ORDER.—The petitioner in these petitions is the Secretary of the Bar Association of Pondicherry. When the Pondicherry State was part of the French Settlements in India, persons intending to practise the profession of law were governed by certain regulations contained in the *Arrete* dated 22nd June, 1932. I shall presently refer to the same. The petitioner's complaint is that the second respondent in each of these two petitions, though having the requisite legal qualification to practise as an advocate, yet, he not having taken the initiative of enrolling himself as a legal practitioner entitled either to plead or to plead and act in accordance with the *Arrete* as above, cannot by the mere accidental circumstance of his having been in Government service at the time when the Advocates Act of 1961 was extended to the State of Pondicherry, seek the assistance of the Bar Council of Tamil Nadu, which is the first respondent in these petitions, for the purpose of being enrolled as an advocate on the rolls of

*W.P. Nos. 121 and 123 of 1971 (P.).
24th January, 1973.

the Bar Council of Tamil Nadu. His main contention is that, in the absence of any effort on the part of the 2nd respondent to get into the portals of the institution of law through the Bar Council of the quandom Pondicherry State, he cannot circumvent the procedure and seek the assistance of the first respondent and get himself enrolled as an advocate. The first respondent's case is that, in accordance with section 58-AA of the Advocates Act of 1961, which was introduced after the Act was extended to the State of Pondicherry, the first respondent had the requisite power and authority to entertain the application of the second respondent to be enrolled as an advocate on the rolls of the Bar Council of Tamil Nadu and it was after due and full enquiry and after a perusal of the necessary records, such an enrolment was effected and therefore the present petitions seeking for a writ of *mandamus* directing the second respondent who has been so enrolled by the first respondent not to practise the profession of law in the Union Territory of Pondicherry and restraining the first respondent from so permitting the second respondent to practise are unsustainable.

2. The entire case depends upon the interpretation of section 58-AA of the Advocates Act of 1961 in the light of the *Arrete* of 1932. The *Arrete* dealing with the institution of Bar Council has three chapters. It is gathered from the text of such chapters that there were three distinct classes of advocates under the French Settlements in India, which included Avocate Conseils, Conseils Agrees and Avocate Stagiaires. The number of persons who could be taken into each class is prescribed for each of the Settlements such as Pondicherry, Karaikal and Chandranagore. Certain qualifications are prescribed for each of the above classes. The Avocate Conseils must be provided with the diploma of Licencie et droit issued by a State University of France or by the State University of Algiers (Article 2). Avocate Conseils and Conseils Agrees are the only qualified legal practitioners qualified to plead and represent. In contradistinction to this, Avocate Stagiaires are authorised only to plead. Provision is made for the preparation of a list of such members in each class of advocates as above, which is to be prepared by the Bar Council of the Settlements. Article 8 provides that Avocate Stagiaires would also be entitled to be entered in the list as Avocate Conseils or Conseils Agrees, provided certain conditions mentioned therein are satisfied. Article 9 is a formal provision providing for the furnishing of security by the first two classes of advocates and enjoining on them to swear on oath in the prescribed manner before the prescribed authority. The decree is also prescribed. Chapter III (Title III) deals with Avocate Stagiaires. They are called probationary advocates. Article 19 says that he should have completed the age of 21 years, should produce his diploma of Licencie et droit, should be a French citizen, should have a civil status and should morally be to the satisfaction of the Chief of the Judicial Department etc. He has to seek entry as a probationer through the Bar Council of the Colony and take an oath before the prescribed authority. On such entry the probationary advocate takes the title of Avocate Stagiaire and he would be entitled to wear a robe and he is subject to all such disciplinary code of conduct applicable to the other two classes of advocates. The probation is for a period of two years and on the expiry of the probation period he has to appear for an examination and if he successfully passes the examination, he would be enlisted as a regular advocate. These provisions, in short, are the relevant provisions for our purposes.

3. Section 24 of the Advocates Act of 1961, as it originally stood prior to the amendment of 1968, prescribed certain educational qualifications, to wit, a degree in law from any University in the territory of India or such other University as is prescribed and referred to in this section. Section 17 enjoins the State Bar Council to maintain a roll of advocates in which shall be entered the names of those who are admitted as advocates by it in accordance with the statutory provisions. On 10th June, 1968, the Advocates Act was extended to the State of Pondicherry and section 58-AA was added to the statute book. That section reads as under:

"Special provisions in relation to the Union of Pondicherry: (1) Notwith-

standing anything contained in this Act, all persons who, immediately before the date on which the provisions of Chapter III are brought into force in the Union territory of Pondicherry, were entitled to practise the profession of law (whether by way of pleading or acting or both) under any law in force in the said Union territory/or who would have been so entitled had they not been in public service on the said date, shall for the purposes of clause (*a*) of sub-section (1) of section 17 be deemed to be persons who were entered as advocates on the roll of a High Court under the Indian Bar Councils Act, 1926, and every such person may, on an application made in this behalf within such time as may be specified by the Bar Council of Madras, be admitted as an advocate on the State roll maintained in respect of the said Union territory.

(2) Notwithstanding anything contained in this Act every person who, immediately before the date on which the provisions of Chapter IV are brought into force in the Union territory of Pondicherry, was practising the profession of law (whether by way of pleading or acting or both or in any other way) by virtue of the provisions of any law in force in the said Union territory, who does not elect to be or is not qualified to be, enrolled as an advocate under sub-section (1) shall, notwithstanding the repeal of the relevant provisions of such law by the Pondicherry (Extension of Laws) Act, 1968, continued to enjoy the same rights as respects practice in any Court or revenue office or before any authority or person and be subject to the disciplinary jurisdiction of the same authority which he enjoyed, or, as the case may be, to which he was subject, immediately before the said date and accordingly, the relevant provisions of the law aforesaid shall have effect in relation to such persons as if they had not been repealed".

That the Advocates Act, 1961 has been extended to the State of Pondicherry is seen from the Pondicherry (Extension of Laws) Act, 1968, which contains various schedules which delincate the various Acts applicable to that State and one such schedule includes the Advocates Act of 1961.

4. In the instant case, it is not denied that the second respondent in each of these petitions was in public service on 10th June, 1968 when the Advocates Act was extended to the State of Pondicherry.

5. Mr. Venugopal, learned Counsel for the Petitioner, after referring to the salient features of the *Arrete* of 1932, urges that, unless and until the second respondent or persons similarly placed sought entry and entered into one or other of the classess of advocates set out in the *Arrete*, it cannot be said that the second respondent is a person who had the requisite statutory qualifications to move the first respondent for being enlisted as an advocate under the Advocates Act of 1961. In the main, it is stated that even though the second respondent in each of the petitions was in public service, as he did not take steps to enrol himself as a probationary advocate or avocate stagiaire, he cannot be said to be an advocate who was entitled on the crucial date, namely, 10th June, 1968, to practise the profession of law either by pleading or by acting. On the other hand, Mr.Balasubramaniam, learned Counsel for the Bar Council, who has produced the records on the issue of the rule *nisi*, says that the Council as a body was satisfied that the second respondent was entitled to practise the profession of law, but for the accident of his having been in public service on the crucial date, and that such entitlement by itself is sufficient within the meaning of section 58-AA of the Act to enrol him as an advocate on the rolls of the Bar Council of Tamil Nadu. That the second respondent in each of these petitions is qualified under Article 2 of *Arrete* is not in dispute. The question is whether a person should have entered into the portals of the Bar Council of the colony by enrolment at least as a probationary advccate before he could move the first respondent for a similar enrolment in the State of Tamil Nadu. Section 58-AA could be scanned and understood thus. (1) There is a *non-obstante* clause in the beginning of the section which obviously means that a special provision has been made as regards persons in the Union territory of Pondi-

cherry qualified in law, but who have not yet entered into the arena of the profession of law. (2) All persons who are *entitled* to practise the profession of law, whether by way of pleading or acting or both under the law in force in the said Union territory, belong to a "definite class" entitled to be enlisted as advocates of the Bar Council of Tamil Nadu. (3) Again, persons who would have been so entitled had they not been in public service on 10th June, 1968, shall also by a fiction be deemed to be persons who could claim entry as advocates on the rolls of the Bar Council, Tamil Nadu. (4) They should however make an application as prescribed and within the time stated, to the Bar Council, Tamil Nadu. Thereafter the Bar Council on verification and enquiry admits such a person or persons as advocates on the State roll. We are not in the instant case concerned with section 58-AA (2).

6. The second requirement which would enable a person to seek such entry into the Bar Council of Tamil Nadu is the subject of controversy. The petitioner would say that the word entitlement in the section could only mean persons who have been already admitted by the Bar Council of the Settlements on its rolls as advocates of one or other of the categories enumerated in the *Arrete* or persons who have taken reasonable and *bona fide* steps for being enrolled at least as a probationary advocate. Merely because a person has the requisite legal qualification it cannot be said that he is one who is entitled to be enrolled in accordance with the deeming provision in sub-clause (1) of section 58-AA. I am unable to agree that the entitlement referred to in the sub-clause as above should be understood in such a restricted way. The Parliament was conscious of the fact that persons in public service on the crucial date, who are otherwise entitled to enter into the arena of legal profession, should not by reason of such accident or circumstance of their being in public service be prohibited from entering into the legal profession. In fact, the deeming clause, as contained in the third requirement in my view, has been introduced so as to benefit such of those public servants who by reason of their preoccupation in such public service are unable to enter into the legal profession though they have the requisite qualifications to do so. It, therefore, follows that if the second respondent in these petitions had the requisite qualifications to enter into one or other of the classes of advocates delineated in the *Arrete*, then such entitlement *per se* would enable him to seek entry in the roll of advocates kept by the Bar Council under section 17 of the Advocates Act of 1961. It is conceivable that in situations like that, it would not be possible for such a public servant to apply to the Bar Council of the colonies under Title III of the *Arrete*. He has to take an oath as prescribed under Article 21. He has to wear a robe and is put in probation as an Avocate Stagiaire for a period of 2 years. Article 29 no doubt prohibits Avocate Conseils and Conseils Agrees from carrying on any other profession or any other bargain. But in public interest it cannot be expected that a probationary advocate can so indulge in other activities other than the practice of the legal profession. It would be unwise to comprehend such a situation because Article 19 provides that the morality of the candidate who seek admission as a probationary advocate should be very high. All these things taken together gives the impression that a person who has the requisite qualifications to enter as a probationary advocate need not necessarily take steps to enrol himself as such to gain entitlement under section 58-AA (1) and move the Bar Council of Tamil Nadu to include him in the list maintained by the latter Council under section 17 of the Advocates Act. Entitlement is an elastic expression and could not be ironjacketed as is sought to be made out by the learned Counsel for the petitioner. The fiction created under section 58-AA will not properly work itself out to its fullest extent, if such a restricted meaning as contended by the petitioner is to be given to the class of persons who could be enrolled by the first respondent as advocates of this State. As long as the second respondent had the legal qualifications then he would be entitled as a matter of right and particularly because of the statutory fiction to gain admission into the list of advocates of this State by enrolling himself through the Bar Council of Tamil Nadu.

7. The decision in *Sunil Kumar* v. *State of West Bengal*[1], was referred to in the course of the arguments in support of the petitioner's contention. I do not think that this decision helps the petitioner in any way. That was a case where the Mukhtearship examination which entitled persons to practise as legal practitioners was stopped after the Advocates Act of 1961 was introduced. The consequence was that nobody could therefore be admitted or be enrolled as Mukhtear under the provisions of the quandom Legal Practitioners Act, which was repealed by the later Advocates Act. Some of the persons who were so kept out and who were prejudiced by reason of the examination for Mukhtearship not being held went to Court and sought for a direction compelling the Committee of Legal Education to hold such examination. In the course of the hearing of the case it was contended that even if there had been a deprivation of the right of the appellants in that case to appear at the Mukhtearship examination and seek enrolment as Mukhtears, yet their right was restored by section 58 (4) of the Act. The Court negatived the contention. Section 58 (4), which is though not in *pari materia* but similar in sense to section 58-AA of the Act, was considered by Mitter, J., who observed that section 58 (4) did not apply to persons who had not acquired the necessary qualifications under section 6 of the Legal Practitioners Act and that it was designed to safeguard the rights of persons who had already acquired the necessary qualifications mentioned in section 6. I have referred to this decision only for the purpose of demonstrating that, if a person is qualified to become an advocate, then he has the requisite entitlement to move such of those statutory authorities as are available to him from time to time and ask them to enrol him as an advocate. The second respondent in each of these petitions could not move the Bar Council of the Colony on or before 10th June, 1968 because they were public servants and they were engaged in an avocation of their own. After the Advocates Act was extended to the State of Pondicherry they having acquired already the qualifications for entry, wanted to enter the profession of law. At that stage, can it be said that they are not entitled to seek admission into the profession? I do not think any such conclusion can be arrived at either generally or in the circumstances of the instant case. As the second respondent in each of these petitions did have the necessary qualifications to seek entry as advocates, they could have done so under the *Arrete*, and having not done so, they could move the first respondent to enrol them as advocates and the act of the first respondent in having enrolled them is in full accord with the text and intendment of section 58-AA of the Act.

8. I may incidentally point out that the petitioner cannot be said to be an aggrieved person either. He is the Secretary of the Bar Association of Pondicherry. He was therefore, an Advocate on the rolls of the Colonies then and is in the list of the Bar Council of Tamil Nadu now. He cannot prevent the expansion of the list of Advocates as there is no such prohibition as to number as was contemplated by the Colonies under the *Arrete*. There at least a minimum number was prescribed for each class of advocates. But, fortunately, there is no such limitation in the list of advocates to be enrolled by the Bar Council of Tamil Nadu and under the Advocates Act of 1961. Again, no personal right of the petitioner is affected by the enrolment of the second respondent in each of these petitions by the first respondent. Even if there is any irregularity in the matter of enrolment by the first respondent, it is for other authorities, other than the petitioner, who should seek to correct the act of the Bar Council of Tamil Nadu. It is not for the petitioner to come up to the Court under Article 226 of the Constitution and seek for a writ of *mandamus* preventing the second respondent in each of these petitions from practising though they have the necessary certificates and also passport to practice as given and endorsed by the Bar Council of Tamil Nadu. On the ground that the petitioner is not a person affected also, these writ petitions should fail.

9. Incidentally I am informed that when the Bar Council of India had occasion to deal with the alleged impropriety or

1. A.I.R. 1963 Cal. 614.

irregularity in the act of the first respondent in having enrolled the second respondent in each of these petitions, it appears that it had approved the act of the Bar Council of Tamil Nadu. On this ground also, no writ can issue against an order which has merged in the order of the Bar Council of India.

10. These writ petitions are dismissed. There will be no order as to costs.

S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*P. S. Kailasam and N. S. Ramaswami, JJ.*

Hayakawa Denki Kogyo Kabushiki Kaisha (Hayakawa Electric Company Ltd), Japan .. *Appellant**

v.

Associated Electronic and Electrical Industries, Bangalore and another .. *Respondents.*

Trade and Merchandise Marks Act (XLIII of 1958), sections 18 and 11 (a)—Registration of trade mark—Requirements to be fulfilled—Section 11 (a), when attracted.

In order to get registration of a trade mark, the applicant should not only be the proprietor of the trade mark but should also satisfy the requirements mentioned in section 9 of the Trade and Merchandise Marks Act. [*Para.* 6.]

For the purpose of claiming proprietorship of a trade mark it is not necessary that the mark should have been used for a considerable length of time. Even a single actual use with intent to continue such use confers a right to such mark as a trade mark. [*Para.* 23.]

Held on facts: As the Indian firm was marketing the concerned transistor radio set as its goods (and not as that of the Japanese firm) the user of the trade mark 'Sharp' in relation to such goods is only in exercise of proprietary right thereof. In any event, it is not possible to hold that the Indian firm had been using the trade mark only on behalf of the Japanese firm. The radio sets marketed in India were not those of the Japanese firm, the latter having supplied only some components (it may be the major components) for manufacturing the sets. Further such components supplied by the Japanese firm were so done only on the basis of seller and buyer relationship and there was no other relationship between the parties. The imports were being made by the Indian firm and not by the Japanese firm. Under all these circumstances it cannot be contended that the Indian firm had not been using the trade mark as proprietor thereof. There can be no doubt that the Indian firm had been using the trade mark 'Sharp' with intent to continue such use in relation to transistor radio sets apart from other goods. It is also clear that the said mark had become distinctive of the goods of the Indian firm. The requirements of section 18 (1) and that under section 9 (1) were therefore satisfied and the Indian firm was entitled to apply for registration of the said mark. [*Paras.* 14, 23 *and* 29.]

Section 11 (*a*) of the Act can be invoked to prevent registration of a trade mark only if the goods of the objector has a reputation in this country. In the present case the goods of the Japanese firm had never come into the Indian market and therefore there is no question of reputation for its goods in this country. Hence section 11 (*a*) of the Act is not applicable to the present case. [*Paras.* 30, 33.]

Cases referred to:

Lavergne v. *Hooper*, (1885) I.L.R. 8 Mad. 149; *Ibrahim Currim* v. *Essa Abba Sait*, (1901) I.L.R. 24 Mad. 163; *In the matter of the Trade Marks Act*, 1938 and *in the matter of Vitamins Ltd.'s application for a trade Mark*, (1965) R.P.C. 1: (1955) 3 All E.R. 827 ; *Brown Shoe Company's case*, (1959) R.P.C. 29 and *Blackadder* v. *Wood Reacts Machinery Company incorporated*, 38 L.L.R. 332; *Meera Sahib* v. *Abdul Azeez*, I.L.R. (1938) Mad. 466: (1938) 2 M.L.J. 651; *Consolidated Foods Corporation* v. *Brandon & Company*, A.I.R. 1965 Bom. 35; In re *Rivier's Trade Mark*, (1884) 26 Ch.D. 48; *Weston Trade Mark (Registration Ch.D.)*, (1968) R.P.C. 167; *G. E. Trade Mark*,

*L.P.A. No. 46 of 1969. 10*th September*, 1973.

(1970) R.P.C. 339; *D.I.E.H.L. Trade Mark*, (1970) R.P.C. 435.

Appeal under Clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Venkatadri dated 22nd November, 1968 and passed in A.A.O. No. 391 of 1965. Appeal against the order of the Assistant Registrar of Trade Marks, Madras, dated 14th May, 1965 and made in Application No. 206181 (Opposition No. M.A.S. 191) in the names of M. B. Lal, M.B. Hiranand and L. Mangharam Trading as Associated Electronic and Electricals Industries for Registration of a trade mark in Class 9.

M/s. King and Partridge, for Appellant.

V. Veeraraghavan, P. S. Chinnappa and *V.K. Mohan'Raj*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This Letters Patent Appeal is against the judgment of Venkatadri, J. in C.M.A. No. 391 of 1965. The dispute is regarding the question whether the first respondent before us is entitled to have the word "Sharp" registered as its trade mark in respect of Transistor Radios, Radio Amplifiers and Inter-communication apparatus, in Part A of the Register. The first respondent is Associated Electronic and Electrical Industries by its partners, M. B. Lal, M. B. Hiranand and L. Mangharam doing business at Bangalore, hereinafter referred to as the Indian firm. The appellant is Hayakawa Denki Kogyo Kabushiki Kaisha (Hayakawa Electric Company Limited) doing business at Okasa, Japan hereinafter referred to as the Japanese firm. The Indian firm filed an application under the provisions of the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as the Act) before the Assistant Registrar of Trade Marks, Madras for registering the word "Sharp" as its trade mark. It was so filed on 7th December, 1961 and was duly advertised in the Trade Marks Journal. Then the Japanese firm lodged a notice of opposition. Affidavits by way of evidence as contemplated under the Act were filed by the respective parties before the Assistant Registrar, who refused to register the trade mark in the name of the Indian firm. Then the Indian firm filed an appeal to this Court which was heard by Venkatadri, J. The learned Judge held that the Indian firm was entitled to registration of the trade mark "Sharp" and therefore, the order of the Assistant Registrar was set aside and the appeal was allowed. It is against this judgment of Venkatadri, J. the present Letters Patent Appeal is filed by the Japanese firm.

2. First we shall notice the facts established in this case. The Japanese firm is a reputed one and it seems to have celebrated its Golden Jubilee in 1961 or so. The word "Sharp" is its trade mark in Japan. Under this trade mark the Japanese firm was selling Radios, Television sets etc. for a long number of years. The Japanese firm has international reputation and it is stated that its goods are marketed in many other countries though there is no evidence to show that the word "Sharp" had been registered as a trade mark for the said firm in any other country than Japan. However, the goods of the Japanese firm had never entered the Indian market. The Japanese firm claimed before the Assistant Registrar that prior to 1939, that is the year in which Japan entered the second World War, Transistor Radios of the Japanese firm were being sold in India and that only because of the War, the export of Transistor Radio sets to India had been stopped. It was also its case that some years after the War came to an end, it corresponded with an Indian firm in Calcutta and also sent its catalogues to the Calcutta firm with the idea of recapturing the Indian market. The Assistant Registrar has not accepted the case of the Japanese firm that it had been selling its Transistor sets in India up to the year 1939. The Assistant Registrar also found that even though the Japanese firm had sent its catalogues to the Calcutta firm that fact is no avail regarding the present controversy. It is now accepted by the Japanese firm that prior to 1959, its goods had never entered the Indian market.

3. The Indian firm has an associate concern which is a proprietary one under the name and style of Lekhraj Jassumal and Sons. Mangharam, one of the partners of the Indian firm is the proprietor of the above concern and he is no other than the father of M. B. Lal and M. H.

Hiranand, the two other partners of the Indian firm. Hiranand was the person who was actively engaged in the affairs of the Indian firm as well as its associate, Lekhraj Jassumal and Sons. Hiranand had been to Japan in or about June 1959 and then, for the first time, he contacted the Japanese firm. The Japanese firm agreed to supply kits of Transistor Radio sets of a particular model to the Indian firm which the Indian firm was to assemble and sell in the Indian market. Accordingly the Japanese firm did supply 500 kits of Transistor Radio sets of a particular model, on the Indian firm getting the necessary import licence therefor. The kits so imported formed the major components for the Transistor Radio sets and the Indian firm assembled them at Bangalore, using some more components, than the kits supplied by the Japanese firm. The Japanese firm had supplied along with the goods the metal badge containing the word "Sharp". The Indian firm marketed the Transistor Radios so assembled by it as its goods.

4. Even before there was any contact between the Indian firm and the Japanese firm, the Indian firm had been using the trade mark "Sharp" for certain of its goods, *viz.*, for Radio Amplifiers, Inter-communication sets as well as Hearing-aids. The finding of the Assistant Registrar is that the Indian firm was so using the trade mark "Sharp" from 2nd January, 1959. It may be particularly noted that as per his finding, which is now accepted by both the parties, the contact between the Indian firm and the Japanese firm was only in June 1959, while the Indian firm has started using the trade mark "Sharp" even from 2nd January, 1959, though such user was only in relation to Radio Amplifiers, Inter-communication sets and Hearing-Aids and not to Transistor Radios. The Indian firm did not even have the know-how for making Transistor Radios prior to its contact with the Japanese firm. The latter supplied the technical know-how and also the kits for assembling.

5. The question for consideration is whether on the above established facts the Indian firm is entitled to have the trade mark "Sharp" registered in India in relation to Transistor Radio sets, Radio Amplifiers and Inter-communication sets. The application for registration is under section 18 of the Act. That section says that any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner. Section 2 (1) (*j*) of the Act defines the word "mark" as including a device, brand, heading, label ticket, name, signature, word, letter or numeral or any combination thereof. Therefore, even a word will be a 'mark'. Section 2 (1) (*v*) of the Act defines the term "trade mark". We are not concerned with sub-clause (*i*) of that sub-section for the present purpose. Under sub-section (*ii*), it is provided that 'trade mark' means a mark used or proposed to be used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user to use the mark. There is no dispute that the word "Sharp" is a trade mark as defined above, but the dispute is whether the Indian firm is a person claiming to be the proprietor of the said trade mark. According to the Japanese firm, the Indian firm had been using the trade mark only on behalf of the Japanese firm, that the Indian firm had never used the said trade mark as proprietor thereof and, therefore, the Indian firm is not entitled to registration of it. The Japanese firm had been contending that the sales of Transistor Radio sets under the trade mark "Sharp" effected by the Indian firm in the Indian market go only to the credit of the Japanese firm who is the proprietor of the mark, that, therefore, it is the Japanese firm which is entitled to have the trade mark registered in its name in this country and that the Indian firm cannot have any such right In fact the Japanese firm filed an application before the Registrar of Trade Marks, Calcutta for registering the trade mark "Sharp" for transistor, radios in its name. This was some time after the Indian firm filed the application before the Assistant Registrar, Madras out of which the present appeal has arisen, and the said application before the Registrar at Calcutta was pending when the Assistant Registrar at Madras disposed of the present application. The Japanese firm

had also entered into an agreement with a Bombay Company by name Indian Plastics Limited, and it is stated that the said company filed yet another application for registering the trade mark "Sharp" in its name at Bombay.

6. The main question for consideration is whether the Indian firm has a proprietary right to the trade mark "Sharp" as far as this country is concerned. The registration of the trade mark in the name of the Indian firm is opposed not only on the ground that the Indian firm is not the proprietor of the said trade mark but also on the ground that none of the requirements contained in section 9 of the Act is satisfied and also by virtue of the prohibition in section 11 (*a*) of the Act. It is not disputed that in order to get registration of a trade mark, the applicant should not only be the proprietor of the trade mark but should also satisfy the requirements mentioned in section 9. Section 9 (1) says that a trade mark shall not be registered in Part A of the Register unless it contains or consists of at least one of the five essential particulars mentioned as (*a*) to (*e*) in that sub-section. It is not claimed that any of the requirements mentioned under (*a*) to (*d*) are satisfied in the present case. But it is claimed that the requirement (*e*) which is, "any other distinctive mark" is satisfied. Sub-section 5 (*b*) of section 9 provides that if by reason of the use of the trade mark (or of any other circumstances) the trade mark is in fact so adopted to distinguish or is in fact capable of distinguishing the goods of the applicant, it can be taken to be a distinctive mark. While it is the case of the Indian firm that the trade mark "Sharp" has become distinctive of its goods by virtue of its user of the mark in relation to its goods, the case of the Japanese firm is that the Indian firm has not acquired any such distinctiveness in respect of the mark inasmuch as the user of the mark by the Indian firm was only on behalf of the Japanese firm.

7. Section 11 speaks of prohibition of registration of certain marks. Even if the Indian firm is the proprietor of the trade mark and has acquired distinctiveness of the mark by user in relation to its goods, still registration of the mark has to be refused if any one of the clasues under section 11 is attracted. According to the Japanese firm, section 11 (*a*) which says that a mark, the use of which would be likely to deceive or cause confusion, shall not be registered as a trade mark, is applicable to this case. According to the Japanese firm, as the trade mark "Sharp" is being used by it for a long number of years in Japan and other countries in relation to Transistor Radios, (and Television sets), the registration of the said mark, in the name of the Indian firm would be likely to deceive or cause confusion as contemplated under section 11 (*a*) of the Act.

8. The main contention of Mr. Vijayaraghavan, the learned Counsel for the Japanese firm is that the Indian firm has no proprietary interest in the trade mark "Sharp", that the Indian firm had been using the trade mark only on behalf of the Japanese firm and that, therefore, the Indian firm is not entitled to apply for registration of the said mark. The contention is that as far as Transistor Radios are concerned, the Indian firm had been using the trade mark only in pursuance of an arrangement between the two firms under which the Japanese firm had been supplying the know-how and the kits and the Japanese firm had only permitted the Indian firm to use the said mark in relation to Transistor Radio sets sold in India. It is further contended that under the above circumstances, even though the Indian firm had been using the trade mark in relation to Transistor Radios, the said mark cannot be considered as distinctive of the goods of the Indian firm.

9. As already noted, Hiranand of the Indian firm had been to Japan in or about June 1959 and then, for the first time, he had contacted the Japanese firm after which there was an arrangement between the two firms and the Japanese firm had supplied not only kits of a particular make of Transistor Radios but also the know-how of assembling the same. The correspondence between the two firms, started from June, 1959 are on record and the learned Counsel for the Japanese firm invited our particular attention to the letter dated 13th September, 1961 written by the Indian firm to the Japanese firm as well as a cable from the Japanese firm and a reply

cable from the Indian firm, at about the time when the two firms fell out. It may be mentioned here that by the end of the year 1961, the arrangement between the two firms under which the Japanese firm had been supplying kits of Transistor Radio sets for assembly by the Indian firm had come to an end. By its letter dated 25th December, 1961, the Japanese firm wrote that it had appointed Messrs. Indian Plastics Limited (a Bombay Company) as its agents in India, and therefore, the Indian firm may correspond with that Bombay Company for any of its further requirements. It is sometime prior to the writing of the abovesaid letter, the cable from the Japanese firm and the reply from the Indian firm came to be given. The letter dated 13th September, 1961 written by the Indian firm to the Japanese firm relied on by the learned Counsel, is also at a time when the arrangement between the two firms was nearing its end.

10. The abovesaid letter dated 13th September, 1961 is in reply to a letter of the Japanese firm which is dated 17th August, 1961. It is seen from these letters that the Indian firm had been requesting the Japanese firm to supply kits of another model than the one for which kits had already been supplied, and in that connection the Japanese firm expressed its doubt as to whether the Indian firm would be in a position to assemble the particular model asked for by the Indian firm. In that connection the Japanese firm asked the Indian firm to send samples of assembled Transistor Radio sets of the previous model of which kits had been supplied by the Japanese firm. In the above letter (dated 17th August, 1961) the Japanese firm also hinted that another Indian firm was ready to enter into negotiations with it (Japanese firm) for purchasing kits of Transistor Radio sets and also pay a royalty of a certain percentage on the sales in the Indian market to the Japanese firm. In its reply dated 13th September, 1961, the Indian firm had agreed to send samples of assembled sets of the previous model (the kits of which had been supplied by the Japanese firm) for examination by the Japanese firm and also stated that its associates (Lekhraj Jassumal and Sons) had been taking pains and good care "to establish the reputation of 'Sharp' in India". The Indian firm also enclosed a copy of a Journal called 'Radio Times of India' in which an advertisement under the name of Lekhraj Jassumal and Sons had been made. A reading of the above letter of the Indian firm dated 13th September, 1961, goes to show that the Indian firm was anxious that the arrangement under which the Japanese firm had been supplying kits of Transistor Radio sets should continue.

11. In the advertisement referred above, it is stated that the Transistor Radio sets sold by Lekhraj Jassumal and Sons (the associates of the Indian firm) are assembled in India in collaboration with the Japanese firm who is the largest manufacturer of Transistor Radios in the world. The words "Golden Jubilee" are also mentioned over the description of the model of the Radio set available for sale. The learned Counsel for the Japanese firm contends, on these facts that the Indian firm had been using the trade mark 'Sharp' only on behalf of the Japanese firm and not as proprietor thereof. However, we are unable to agree with this contention.

12. It must be remembered that the Indian firm had been using the trade mark "Sharp" even from January, 1959, while the first contact between the two firms was only in June, 1959. No doubt, before the contact between the two firms, the Indian firm was manufacturing only Radio Amplifiers, Inter-communication sets and Hearing-aids and it had nothing to do with Transistor Radios. As already mentioned, the Indian firm had not even the know-how to make Transistor Radio sets before it came into contact with the Japanese firm. Even so the fact remains that the Indian firm adopted the trade mark "Sharp" for certain class of goods manufactured and marketed by it in this country, even before it had anything to do with the Japanese firm. It has not been the case of the Japanese firm that such adoption of the trade mark "Sharp" even in January, 1959 by the Indian firm was a dishonest user. It has not been the case of the Japanese firm that the Indian firm had copied its trade mark. The word "Sharp" is not *per se* distinctive. The Japanese firm had not sold any of its goods in India prior to the Indian firm adopting the abovesaid

word "Sharp" as its trade mark. Anyway in the objections taken by the Japanese firm for the registration of the mark in the name of the Indian firm, it is not stated that the Indian firm had adopted the mark dishonestly. The only case put forward is that the Indian firm had been using the trade mark only on behalf of the Japanese firm and that, therefore, the said trade mark has become distinctive in India only in relation to the goods of the Japanese firm and not that of the Indian firm.

13. Mr. Vijayaraghavan, the learned Counsel for the Japanese firm had to concede that he cannot object to the registration of the trade mark "Sharp" in the name of the Indian firm in relation to the Inter-communication sets, Radio Amplifiers etc., and the objection can be only in respect of Transistor Radios. The learned Counsel contends that the mere fact that a particular person has established a right to register a trade mark in relation to some of his goods does not mean that the said person would be entitled to have the mark registered in respect of all of his other goods as well. It is stated that a particular trade mark can be that of a particular person in relation to certain class of goods and that of another in relation to certain other classes of goods. Philips Milk of Magnesia and Phillips Radio sets were mentioned as examples for the same trade mark being owned by different persons in relation to different classes of goods. But the question here is not whether a particular trade mark can be owned by two different persons in relation to two different classes of goods. The question is whether the Indian firm had been using the trade mark "Sharp" in relation to Transistor Radio sets as proprietor thereof, or whether it was using it on behalf of the Japanese firm. The fact that the Indian firm has started using the trade mark "Sharp" even from January, 1959 though in relation to Inter-communication sets and Radio Amplifiers (and not to Transistor Radios), becomes important. Undoubtedly the Indian firm has been using the trade mark from January, 1959 as proprietor thereof. The question is whether the user of the same trade mark in relation to Transistor Radio sets was in any other capacity.

14. In the entire correspondence between the two firms, there is nothing about the trade mark itself. Admittedly there is no written agreement between the two firms for one firm to supply kits of Transistor Radio sets to the other. It is only from the correspondence, one has to gather the nature of the arrangement between the two firms. It appears to us that the arrangement amounted to the Japanese firm selling kits of Transistor Radio sets to the Indian firm with the know-how to assemble the same and nothing more. Even though the Indian firm might have said that the Radio sets sold by it in India were the 'merchandise' of the Japanese firm and in the advertisement it mentioned the words "Golden Jubilee" which may possibly refer only to the Japanese firm, it is impossible to hold that the Transistor Radio sets marketed by the Indian firm in this country were not its goods. It may be noted that the Indian firm was not importing Transistor Radio sets. The import licence was only for getting the kits of Radio sets which might form the major components of the Radio set. The Indian firm had to utilise other components in assembling the Radio set. Anyway the Radio sets marketed in this country were really the goods of the Indian firm. This position cannot be disputed and it is not disputed either. The Japanese firm had also been supplying the Badge containing the word "Sharp" but that fact does not advance the case of the Japanese firm to any extent, for, one is not concerned as to who supplied the metal Badge but the real question is regarding the user of the trade mark "Sharp". The metal Badges were being supplied as any other component of the Radio sets and that fact should not be confused with the question as to user of the trade mark. Even if the Badge had not been supplied by the Japanese firm there was nothing in the arrangement which prevented the Indian firm from using the trade mark "Sharp" for the Radio sets assembled and sold by it. The Japanese firm supplied only the metal containing the name "Sharp" and not the trade mark. In the cable referred to above, the Japanese firm said that it can supply kits of earlier model of the Transistor Radio sets only without the Badge. The Indian firm in its reply

cable stated that the kits of Radio sets which they required might be supplied without the Badge. The learned Counsel for the Japanese firm heavily relied on the above fact, namely that the Japanese firm wanted to withhold the Badge and the reply of the Indian firm agreeing to it, in support of his contention that the Indian firm had been using the trade mark only on behalf of the Japanese firm. It is contended that in any event the Indian firm had not been claiming any proprietory interest in the trade mark. However, we are unable to agree. The supply of the metal Badge containing the word "Sharp" or the withholding of the same by the Japanese firm does not seem to have any relevance to the question whether the Indian firm had been using the trade mark "Sharp" as proprietor thereof in relation to Transistor Radio sets as well other items sold by it in India. As we said, there is nothing in the entire correspondence between the parties to show that there was any agreement between them regarding the user of the trade mark "Sharp". As the Indian firm was marketing the Transistor Radio sets as its goods (and not that of the Japanese firm), the user of the trade mark in relation to such goods is only in exercise of proprietory right thereof. In any event, it is not possible to hold that the Indian firm had been using the trade mark only on behalf of the Japanese firm. It is needless to stress that the Radio sets marketed in India were not those of the Japanese firm, the latter having supplied only some components (it may be the major components) for manufacturing the sets. Further there can be no doubt that such components which were supplied by the Japanese firm were so done only on the basis of seller and buyer and there was no other relationship between the parties. The imports were being made by the Indian firm and not the Japanese firm. Under all these circumstances, we are unable to agree with the contention of the learned Counsel for the Japanese firm that the Indian firm had not been using the trade mark as proprietor thereof.

15. The contention on behalf of the Indian firm has been that the Japanese firm had acquiesced in the Indian firm using the trade mark as its own in relation to Transistor Radio sets sold in India and, therefore, the Japanese firm cannot be heard to say that the Indian firm cannot have the trade mark registered in Part A of the Register. It is stated that the Japanese firm had full knowledge that the Indian firm had been marketing Transistor Radio sets assembled by it in India with the trade mark "Sharp" and the Japanese firm never demurred to this. It is unnecessary to pursue this aspect of the argument because we are clear, whether the Japanese firm acquiesced in it or not, the Indian firm had acquired a proprietory right to the same inasmuch as it had marketed its Transistor Radio sets in this country with the trade mark "Sharp", and the Japanese firm had never come into the Indian market.

16. It has also been contended on behalf of the Indian firm that as far as the Indian market is concerned, the Japanese firm should be deemed to have abandoned the trade mark "Sharp". It is also contended that under the circumstances of the case the Japanese firm is estopped from objecting to the registration of the trade mark in the name of the Indian firm. For reasons stated supra, we are of the opinion, that the question of abandonment or estoppel need not be pursued.

17. Now turning to the case-law regarding the question as to under what circumstances a person can claim proprietary right in a trade mark, the learned Counsel for the Japanese firm says that all the decisions referred to by the learned Judge (Venkatadri, J.) are really supporting the position taken by the Japanese firm and that the learned Judge has misapplied the principles stated in those cases. However, we are unable to agree with this contention. The decisions discussed by the learned Judge in his judgment are:

Lavergne v. *Hooper*[1], *Ibrahim Currim* v. *Essa Abba Sait*[2], *Meera Sahib* v. *Abdul Azeez*[3], *Consolidated Foods Corporation* v. *Brandon and Company*[4], In the matter of the *Trade Marks*

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1. (1885) I.L.R. 8 Mad. 149.
2. (1901) I.L.R. 24 Mad. 163.
3. I.L.R. (1938) Mad. 466 : (1938) 2 M.L.J. 651 : A.I.R. 1938 Mad. 1.
4. A.I.R. 1965 Bom. 35.

Act, 1938 and In the matter of *Vitamins Ltd.'s application for a trade mark*[1], *Brown Shoe Company's case*[2] and *Blackadder* v. *Good Roads Machinery Company Incorporated*[3].

18. In *Laverone* v. *Hooper*[4], the question was whether a French Company doing business at Cognac (France) in brandy, possessed a proprietary right in the trade mark 'Maltese Cross' as far as India is concerned. On facts it was found that the French Company had three classes of trade marks some of which were used by it for brandy specially prepared on order, and which the French Company regarded as the property of the person who gave the order. The trade mark 'Maltese Cross' came under that category. It was also in evidence that the representative of the defendant in the case, doing business in brandy in India, had been to Cognac and selected the trade mark 'Maltese Cross' for brandy to be supplied by the French Company to the defendant and the said trade mark 'Maltese Cross' was used only in respect of brandy so supplied to the defendant. A Division Bench of this Court held that under the circumstances of the case, the said mark 'Maltese Cross' was intended to be the special trade mark of the importer (defendant who was doing business in India) and not of the exporter (French company). The Court also found that the French company had failed to prove that they had adopted the 'Maltese Cross' as one of its trade marks up to the date on which the defendant chose the said mark for imports to be made by it in India. It was also found that the representative of the defendant was shown the 'Maltese Cross' mark with the representation that it was open to the defendant to use the mark as its own. Under such circumstances, it was held that the defendant in India was the proprietor of the trade mark "Maltese Cross" and not the French company. As the said mark which the French company originally possessed (though it had not used) had been chosen by the defendant in India on the mark being shown to its representative by the French company and in view of the attendant circumstances, it was held that the French company should be deemed to have abandoned the mark and if it had not so abandoned its conduct estopped it from denying the right of the defendant so adopting it. Mr. Vijayaraghavan, learned Counsel for the Japanese firm points out, we think justifiably, that the above decision would not help the Indian firm regarding the question of abandonment or estoppel, for the facts in the above case are clearly distinguishable from those in the present case. As already noted, in the above case the French company had never used the 'Maltese Cross' mark though it had that mark in its possession along with several other marks for being used for brandy specially prepared on orders. Further the French company while showing the mark to the representative of the defendant represented that the defendant can use the mark as its own. But in the present case no such thing happened. Therefore, the above case may not be of any help to the Indian firm if it wanted to press the question of abandonment or estoppel.

19. The learned Counsel for the Japanese firm contends that the above case is an authority for the proposition that if a person possesses and uses a trade mark in one market as to constitute a right in it, he would have an exclusive right to that trade mark in any other market. In the above case as the French company had never entered the Indian market by itself, one of the questions was whether it had any right to the mark 'Maltese Cross' as far as India is concerned. Though the Division Bench posed the question, it did not give a specific finding regarding the same. At page 152, the question is raised but at the end of page 153, the learned Judges concluded as far as that point is concerned with the remark that in the view that they are taking of the case it is unnecessary to determine the point. As already seen the view taken by the Division Bench of the case was that the French company must be deemed to have abandoned the mark, or at any rate, by its conduct, estopped from denying the right of the defendant to adopt it as far as India is concerned. The first head-note in the above decision "such posses-

1. (1965) R.P.C. 1 : (1955) 3 All E.R. 827.
2. (1959) R.P.C. 29.
3. 38 C.L.R. 332.
4. (1885) I.L.R. 8 Mad. 149.

sion and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade mark in other markets, although the owner may not have used it in such markets", is rather misleading because such a finding has not been given by the learned Judges. As already seen, the point had not been decided.

20. *Ebrahim Currim* v. *Essa Abba Sait*[1] is a case decided by a single Judge of this Court on the original side. In that case the plaintiff's firm had been importing umbrellas bearing the trade mark "Stag", into this country from a firm in Glasgow, Scotland. The umbrellas so imported were being marketed by the plaintiff in the Indian market as its own goods. It complained that the defendant had commenced importing and selling in Madras, umbrellas which bore the trade mark so similar as was calculated to deceive the purchasers. The prayer was for an injunction and damages against the defendant. The defendant contended that the trade mark "Stag" belonged to and had, since 1884, been used by the firm at Glasgow who manufactured the umbrellas and that, therefore, the plaintiff cannot claim exclusive right to the said mark. The contention was that inasmuch as the trade mark had originally belonged to the Glasgow firm it could not be lawful to use, or be claimed by the plaintiff, notwithstanding the fact that the Glasgow firm had never used it in India. This contention was negatived by the learned Judge holding that the prior use of the mark by the Glasgow firm in Scotland would not justify that firm as well as the defendant in claiming that the plaintiff's use of the trade mark was illegal or otherwise than an exclusive user. We think, to that extent, the above decision is against the present contention of the learned Counsel for the Japanese firm. In that case the trade mark in question was that of the Glasgow firm as far as Scotland was concerned. But that fact did not prevent the Indian importer from acquiring a right to the mark in this country. The learned Judge observed at page 168:

> "Yet it was mainly on the strength of the theory that trade mark is property that it was contended before me that prior ownership of a trade mark in Scotland excluded the possibility of ownership of the same symbol in India. The proposition seems to me to go a great deal beyond what is required for the protection of traders. * * * No case was cited in support of the proposition that the Scotch firm could maintain an action here against the plaintiff."

At page 169, the learned Judge observed that there was no authority that a man can maintain an action for infringement of his trade mark without proof that his goods have ever been brought into the market. This observation, however, may not be applicable to the present case, as here, we are concerned only with the right of the Indian firm to the trade mark in question and once it does not establish such right, it is not disputed that the Japanese firm can validly oppose registration.

21. *Meera Sahib* v. *Abdul Azeez*[1], is a decision of a Division Bench of this Court in a passing-off action. Two plaintiffs brought the action one of whom the first plaintiff was a company carrying on business in London and the second plaintiff was a piece-goods merchant doing business in Madras. The second plaintiff had been purchasing twill from the first plaintiff and importing the same and selling them in Madras. The trade mark on which the twill was sold is "Diamond". That was the trade mark designed by the first plaintiff (Company in London) and as far as the business in England was concerned, the said tarde mark "Diamond" belonged to the first plaintiff. However, the first plaintiff had not sold goods in India bearing the said mark. Only the second plaintiff had been purchasing the goods (twill) from the first plaintiff and importing the same to India and selling it under the same mark "Diamond". The question arose whether the first plaintiff can maintain an action for passing off against the defendant in that case. The Court held that the first plaintiff cannot maintain the suit, and that only the second plaintiff can. The learned Counsel for the Japanese firm ponits out that

1. (1901) I.L.R. 24 Mad. 163.

1. I.L.R. (1938) Mad. 466 : (1938) 2 M.L.J. 651.

rights of the two plaintiffs *inter se* had not been decided in that case and, therefore, that is not an authority regarding the question in this case as to who owned the proprietary right in respect of the trade mark "Sharp" as far as this country is concerned. This contention of the learned Counsel does not appear to be sound as the Court had decided that the first plaintiff was not entitled to maintain the suit as it had never marketed its goods in the Indian market. However the above decision is not applicable to the present case for another reason. That case was in a passing-off action, the same having arisen before the Trade Marks Act, 1940, came into force. In that case the question was not whether the defendant was entitled to registration of the mark. In the present case the Indian firm has to establish a right to have the word "Sharp" registered as its trade mark. The fact that the mark has not become distinctive of the goods of the Japanese firm (on the ground that the Japanese goods had never come into the Indian market) by itself would not entitle the Indian firm for registration of the mark. Therefore, we think, the above case (*Meera Sahib* v. *Abdul Azeez*[1]), is not of help to the Indian firm. At the same time, it would not help the Japanese firm either.

22. In *Consolidated Foods Corporation* v. *Brandon and Company*[2], an American firm by name Consolidated Foods Corporation had been importing into India food products and marketing the same under the trade mark "Monarch". Such imports began in 1935, but had to be suspended during the Second World War. It was resumed in 1947 but had to be stopped in 1950 due to import restriction imposed by the Indian Government. In 1957, a company by name Brandon and Company, filed an application for registration of the trade mark "Monarch" on the footing that it had started using the said mark for its food products from 1951. The Consolidated Foods Corporation opposed registration and that opposition was ultimately sustained by the Bombay High Court in the above case. That was on the ground that it was the Corporation which began using the said trade mark in relation to food products in this country in the first instance and that there was nothing to show that the said Corporation had abandoned the trade mark. This case would in no way help the Japanese firm in the present case, for the simple reason that the Japanese firm had never used the trade mark "Sharp" in the Indian market, unless it can be held that the Indian firm had been using the trade mark only on behalf of the Japanese firm. The above case proceeds on the footing that the person who uses a particular trade mark in the first instance would be the proprietor of the said mark entitled to registration. As, in the present case, the Japanese firm had never entered the Indian market and had never used the trade mark in relation to its goods, it is the Indian firm who should be considered to own the proprietary right in the mark.

23. Incidently it may also be noted that for the purpose of claiming proprietorship of a trade it is not necessary that the mark should have been used for a considerable length of time. Even a single actual use with intent to continue such use confers a right to such mark as a trade mark. There can be no doubt in the present case that the Indian firm had been using the trade mark "Sharp" with intent to continue such use in relation to Transistor Radio sets apart from other goods.

24. Re *Application of Vitamins Limited*[1], is a case where an American Company had been marketing its pharmaceutical goods under the trade mark "Pabalate". The said goods had not entered the English market, but there was evidence that the American Company had advertised its goods in England, at least once. An English Company, by name Vitamins Limited, filed an application to register the trade mark "Pabalate" in its name in England. That was opposed by the American Company and ultimately the Chancery Court upheld the opposition and refused registration in favour of the English Company. Even though in that case, the American goods had not entered the English market as noted earlier, the American Company had advertised its goods under the trade mark "Pabalate" in England. Further, the American

1. (1938) 2 M.L.J. 651 : I.L.R. (1938) Mad. 466.
2. A.I.R. 1965 Bom. 35.

1. (1955) 3 All E.R. 827 : (1956) R.P.C. 1.

Company itself had originally applied for registration of the trade mark in its name in England though that application had been withdrawn. The Chancery Court held under the circumstances of that case that the American Company had been claiming to be the proprietor of the trade mark "Pabalate" even very much prior to the English Company applying for registration and that the English Company had no proprietary right in the same. At page 834, Lloyd-Jacob, J., who decided the above case, observed:

> "A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but in my judgment, it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated. Whereas here another party in respect of precisely the same field of activity in commerce or industry had already put forward, by an application to the trade marks registry, a claim to be the proprietor of the identical trade mark and had withdrawn the application because of a desire to avoid a controversy over the mark, it seems to me to be straining language to suggest that the party who had by opposition secured that result had, as the result of the withdrawal, acquired proprietary rights."

It may be noted that the English Company had opposed the application originally made by the American Company for registration of the trade mark "Pabalate" in England. It was after such opposition by the English Company, the American Company withdrew its application. Later the English Company itself filed an application for registration of the said trade mark. It was refused, as already seen on the ground that the English Company had never acquired any proprietary right in the said trade mark. Mr. Vijayaraghavan, the learned Counsel for the Japanese firm contends that in the above case in spite of the American Company not having established proprietorship in respect of the trade mark "Pabalate" as far as England was concerned, registration of the said trade mark in the name of the English Company was refused and that, therefore, in the present case even if the Japanese firm has not established a right to have the trade mark "Sharp" registered in its name in this country, that by itself would not entitle the Indian firm to have the mark registered in its name. But the difference between the above case and the present one is that while in the former the English Company did not acquire proprietorship of the mark "Pabalate" because of the circumstances in that case, in the present case there are circumstances to indicate that the Indian firm had been using the trade mark "Sharp" claiming proprietary right thereof. As already noted in the case before the Chancery Division, even though the American Company had not marketed its goods in England it had advertised the goods in that country and had also applied for registration of the trade mark in its own name, very much prior to the English Company applying for the same.

25. In *Brown Shoe Company Inc.'s Application*[1], is really a case of copying another mark. There also the controversy was between an American Company and an English Company as far as the English market was concerned. The American Company had been using the trade mark "Naturalizer" in relation to ladies' shoes. Those shoes were very popular in America and certain other countries. However, the goods of the American Company had not entered the English market. An English Company got the trade mark "Naturalizet" registered in its name in England. The Amercian Company applied for expunction of the said mark from the Register. It was held that the English Company had copied the trade mark from the American Company, and, therefore, the English Company was not entitled to be the proprietor of the mark "Naturalizet". It has to be noted that though the American Company had not actually sold its goods in the English market, it had advertised its goods in that market. The American Company had also applied for registration of the mark in England very much prior to the English Company applied for registration and got it registered, though that application had been withdrawn by the American Company. In 1955, when the American

1. (1959) R.P.C. 29.

Company tried to renew its application for registration of the trade mark "Naturalizer" in its name, it came to know that the English Company had already registered the trade mark "Naturalizet" in its name and it was thereafter the application for expunction was filed. It was in these circumstances, it was held that the English Company had copied the trade mark from the American Company and therefore the English Company had not acquired any proprietorship in the mark. This cannot apply to the present case.

26. *Blackadder* v. *Good Reads Machinery Company Incorporated*[1], is a case on which the learned Counsel for the Japanese firm placed great reliance. That was a case where an Australian Company by name British-Australian Machinery Company Limited had been importing road-grading machines from America. The American exporters had been using the trade mark "Winner" as well as "Champion" for their road-grading machines. The machines imported by the abovesaid Australian Company were "Winner" machines. However, the Australian Company had been marketing those machines in Australia after removing the name-plate "Winner" and substituting it with the word "Champion". The Australian Company failed and the debenture-holders seized the assets of the said Company. While one Blackadder, one of the debenture-holders, took over the assets of the Company in the tramway, tubes and fittings, and general machinery departments, a company by name Armstrong Holland Limited took over the assets of the abovesaid Australian Company in the road machinery department. Armstrong Holland Limited continued to trade with the American Company and they had been importing "Winner" road-grading machines but had been marketing them in Australia after replacing the name "Winner" with the name "Champion". Blackadder formed a partnership with another and got the word "Winner" registered as his own trade mark in respect of machinery of all kinds. The American Company which had been supplying road-grading machines applied for rectification of the Register contending that Blackadder cannot have the word "Winner" registered in his name. The contention of the American Company was accepted and rectification ordered by a single Judge of the Australian High Court. An appeal to the Full Court of the High Court of Australia by Blackadder was dismissed.

27. Mr. Vijayaraghavan, learned Counsel for the Japanese firm contends that the above case is on all fours with the present one as in that case also the American Company had no reputation of its own in the Australian market and that the word "Winner" had not become distinctive of the goods of the American Company and in spite of that the registration of the word in the name of Blackadder came to be expunged. But a careful examination of the facts of the above case reveals several circumstances which are absent in the present case. The question in that case was whether Blackadder and his partner had established a right to the registration of the word "Winner", or, in other words, whether they were the proprietors of the word "Winner". Both Blackadder and his partner had been originally working in the British-Australian Machinery Company Limited which had been importing the "Winner" machines from America and later, Blackadder with his partner had also been employed by Armstrong Holland Limited and in that way, they became intimately acquainted with the business of those Companies and with the trade of the American Company with Australia. They simply appropriated the word "Winner" which the American Company had used in Australia. It was also found by the learned Judge Starke, J.) of the Australian High Court that the transaction between the American Company and the Australian Company constituted a trade with Australia on the part of the American Company in road-grading machines bearing the words "Champion" and "Winner". It was also found that the American Company had lawfully used the word "Winner" in Australia in a limited way though it had acquired no exclusive right to its use. It was under the above circumstances it was held that Blackadder and his partner had not established a proprietary right to the mark.

1. 38 C.L.R. 332.

28. Knox, C.J., one of the Judges who heard the appeal by Blackadder and his partner observed:

> "The inference which I draw from the facts proved is that the object of the appellant in applying to register the mark now in question was either to obtain the sole right of selling in Australia goods bearing the mark which to his knowledge was used by the respondent or to prevent the respondent from selling, in Australia or for sale on the Australian Market, goods bearing that mark. In those circumstances it appears to me that the decision of my brother *Starke*, supported, as it is, by the reasoning in In re *Rivere's Trade mark*[1] is correct."

Therefore, that was not a case where the American Company had nothing to do with the Australian market as far as "Winner" road-grading machines were concerned. The road-grading machines which were imported into Australia did bear the name "Winner" though while marketing, the name was changed from "Winner" to "Champion". Therefore the above decision would not help the Japanese firm in the present case.

29. The foregoing discussion will show that the Indian firm had been using the word "Sharp" as proprietor thereof not only in respect of Inter-communication sets and Radio Amplifiers etc., but also in respect of Transistor Radio sets. It is also clear that the said word had become distinctive of the goods of the Indian firm. The requirements of section 18 (1) and that under section 9 (1) are therefore satisfied.

30. The only question that remains for consideration is whether the prohibition contained in section 11 (*a*) of the Act is applicable. In other words, the question is whether the mark is one which would be likely to deceive or cause confusion. In this connection, the learned Counsel for the Japanese firm contends that even though "Sharp" Radio sets of Japanese firm had not come into the Indian Market they have world wide reputation and, therefore, the registration of the word "Sharp" in the name of the Indian firm would cause confusion. But we are of the opinion that in a case like this, section 11 (*a*) of the Act can be invoked to prevent registration of a trade mark only if the goods of the objector had a reputation in this country. In *Consolidated Foods Corporation* v. *Brandon and Company*[1], already referred to regarding the other point, it has been held that for the purpose of section 11 (*a*) it is necessary that the mark should have attained such reputation among the members of the public as would lead them to associate the mark only with the product of the objector and of no one else. It may be remembered that in that case the dispute was between Consolidated Foods Corporation an American firm, and Brandon and Company Private Limited, a Company doing business in Bombay, regarding the trade mark "Monarch" in relation to food products. Considering the fact that the said Corporation had imported its goods into India earlier, though after 1950 it could not do so, due to import restriction, and certain other circumstances, it was held that Brandon and Company Private Limited, had not acquired any right of proprietorship in the trade mark "Monarch" and that, therefore, they were not entitled to have it registered. The said Corporation in its objection had raised various contentions, one of which was that Brandon and Company Private Limited, were not the proprietors of the mark. This was accepted by the Bombay High Court and registration of the mark was refused. Another contention raised by the Corporation was one under section 11 (*a*) of the Act but that contention was not accepted, the Bombay High Court holding that the Corporation did not adduce evidence to establish the necessary degree of reputation of the mark "Monarch" in India on the relevant date and that therefore the objection raised under section 11 (*a*) of the Act was not tenable. This is clearly against the present contention on behalf of the Japanese firm. In the above case, as noted earlier, the Corporation had in fact marketed its goods under the trade mark "Monarch" prior to 1950, but after that year, as imports have been prohibited, the Corporation's goods had not entered the Indian market. So it was held that

1. (1884) 26 Ch.D. 48.

1. A.I.R. 1965 Bom. 35.

the Corporation had not established such reputation in the Indian market which would attract section 11 (*a*) as a ground to refuse the registration of the trade mark in the name of Brandon and Company, Private Limited. In the present case the goods of the Japanese firm had never come into the Indian market and therefore, there is no question of reputation for its goods in this country.

31. In *Brown Shoe Company Inc's Application*[1], which was also noticed for the earlier point, the finding regarding the question of confusion is against the present contention of the Japanese firm. As noticed earlier, the dispute in that case was between an American Company and an English Company regarding the marks "Naturalizer" and "Naturlizet" in relation to ladies shoes. Even though the goods of the American Company had not entered the English market, there were circumstances to indicate (as already pointed out) that the English Company had copied the trade mark and that therefore, it was not the proprietor thereof. But, on the question whether registration could be refused on the ground of confusion it was held by the Chancery Court that although advertisements of the ladies shoes of the American Company ("Naturalizer") had appeared in papers circulated in England and was known to certain persons resident in England, there was no ground for rejecting the mark "Naturlizet" under section 11 (2) of the Trade Marks Act, 1938 (corresponding to section 11 (*a*) of the Act). This again is clearly against the contention of the Japanese firm in the present case.

32. But in this connection, Mr. Vijayaraghavan, learned Counsel for the Japanese firm relies upon *Re-Application of Vitamins Limited*[2] which again is a case already referred to in respect of the earlier point. In that case again, the pharmaceutical goods of the American Company under trade mark "Pabalate" had not entered the English market, but advertisements had been made in magazines circulated in England, and there was also the circumstance that the American Company itself had applied for the registration of the word "Pabalate" in respect of its goods earlier, though that application came to the withdrawn. Apart from holding that the English Company was not the proprietor of the word "Pabalate" and hence not entitled to registration of the same, regarding the question of confusion, Lloyd-Jacob, J., observed:

> "Having regard to the international character which medicine and the allied sciences have assumed and increasingly assumed during the last two decades, the Court must be particularly careful to see that in exercising its discretion under the Act the public interest is not in any way imperilled. I am not satisfied that, in allowing to be used by manufactures in this country as a brand name for a pharmaceutical substance a word which is in fact used by an American Corporation in respect of the same material and advertised in journals which on the evidence are received and referred to in this country, the public interest will be best served by permitting registration".

Therefore, it was on the special circumstances of that case that medicine and allied sciences have international character and that the goods of the American Company were also being advertised in journals which were circulated in England, that it was held that section 11 was attracted. Such special circumstances are not present in this case.

33. Therefore we hold that section 11 (*a*) of the Act is not applicable.

34. The only other contention raised by the learned Counsel for the Japanese firm is under section 11 (*e*) of the Act. By that provision, a mark, which would otherwise be not entitled to protection in a Court, shall not be registered. From what we said earlier, it will be clear that the above provision is not attracted in respect of the trade mark "Sharp" and the Indian firm is entitled to have it registered in its name.

35. In the course of the arguments, section 12 (3) of the Act was also referred to and it was contended on behalf of the Indian firm that in any event it was entitled to registration of the mark by virtue of its concurrent use of the trade mark as contemplated under section 12

1. (1959) R.P.C. 29.
2. (1955) 3 All E.R. 827: 1956 R.P.C. 1.

(3). But in view of our findings earlier, this question does not arise.

36. Mr. Sastry, learned Counsel for the Indian firm referred to the decisions in *Weston Trade Mark (Registration Ch.D.)* [1], *G. E. Trade Mark*[2] and *"Diehl" Trade Mark*[3], in support of his case that the Indian firm is entitled to registration of the trade mark "Sharp". But we are not referring to those decisions in detail as we think it is not necessary. Suffice it to state that those cases are distinguishable on facts from the present case.

37. The result is the Letters Patent Appeal fails and is dismissed. However, there will be no order as to costs.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

The Commissioner, Hindu Religious and Charitable Endowments, Madras *Appellant**

v.

Vaithinatha Gurukkal and others *Respondents.*

(A) *Trusteeship—Small temples—Archakas may also be trustees—Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959).

There is nothing illegal or improper in Archakas being trustees of small temples. [*Paras.* 7-*A and* 8.]

(B) *Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 63 (b)—*Deputy Commissioner—Trusteeship of a temple—Whether hereditary or not—Empowered to decide—Hereditary trusteeship—Admission—Whether a particular person is entitled to function as a hereditary trustee at a particular point of time—No jurisdiction in Deputy Commissioner to decide.*

Under section 57 (*b*) of the Madras Hindu Religious and Charitable Endowments Act of 1951 or 63 (*b*) of the Act of 1959, the Deputy Commissioner is empowered to decide whether the trusteeship in relation to a religious institution was hereditary or not and not to decide whether a particular person was entitled to function as a hereditary trustee at a particular point of time, with reference to a temple, the hereditary nature of the trusteeship of which had been admitted. [*Para.* 10.]

(C) Res judicata—*Principles in section* 11, *of Civil Procedure Code—Applicable to other proceedings.*

The principles of *res judicata* in relation to suits enunciated in section 11 of the Civil Procedure Code are not exhaustive. The general principles of *res judicata* would, however, apply to other proceedings even though section 11 of the Code of Civil Procedure would not in terms apply. [*Para.* 10.]

(D) Res judicata—*Applicability on general principles—To be directly and substantially in issue in former proceedings—Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 63 (*b*)—*Temple—Deputy Commissioner—Trusteeship—Whether hereditary or not—Not in dispute in prior proceedings—Determination of question in subsequent proceedings—No bar of* res judicata.

For the purpose of the application of the general principles of *res judicata* a particular matter should have been directly and substantially in issue in former proceedings so as to bar the reconsideration of the same matter in subsequent proceedings. [*Para.* 10.]

If the question whether the trusteeship was hereditary or not was not in issue between the parties in procedings under the Madras Hindu Religious and Charitable Endowments Act, the Deputy Commissioner would have no jurisdiction whatever to decide that question. Therefore if the Deputy Commissioner rendered a finding on that question which was not in controversy or dispute before him, his finding cannot be said to be final or conclusive so as to bar the agitation of the same question in a properly framed proceeding instituted subsequently. [*Para.* 10.]

Cases referred to :—

Muthuswami Gurukkal v. *Aiyaswami Thevar*, (1964) 2 M.L.J. 669; *Sastri Ammal* v.

1. (1968) R.P.C. 167.
2. (1970) R.P.C. 339.
3. (1970) R.P.C. 435.

* Appeal No. 478 of 1967 and Memorandum of Cross-objections. *6th September,* 1973.

Pravalavarna Naicker, I.L.R. (1957) Mad. 631: (1955) 2 M.L.J. 612: (1955) 68 L.W. 777: A.I.R. 1956 Mad. 146· *Chinnathambi Moopan* v *Mamundi Moopan*, (1966) 1 M.L.J. 361.

Appeal and Memo. of Cross-objection against the Decree of the Court of the Subordinate Judge of Mayuram dated 30th November, 1966 and passed in Original Suit No. 11 of 1966.

The Additional Government Pleader, for Appellants

V. Balasubramanian and *J. Jayaraman*, for Respondents

The Judgment of the Court was delivered by

Ismail, J.—The first defendant in O.S. No. 11 of 1966 on the file of the Court of the Subordinate Judge of Mayuram is the appellant herein. The suit related to a temple known as Sri Panchavatiswaraswami Temple, situate in Ananthandavapuram in Thanjavur district. Exhibit B-1 is an extract of the Inam Statement of one Appa Gurukkal dated 16th December, 1861 made before the Inam Commissioner. That statement shows that properties were endowed for Sri Panchavatiswaraswami Temple and that Appa Gurukkal was the person in possession of the properties and was also the Archaka of the temple. Exhibit A-1 is an extract for the Inam Register of Anathandavapuram village. That extract shows, that Appa Gurukkal was the worshipper in possession and the inam itself was confirmed and continued so long as the worship was regularly rendered. Exhibit B-2 is the copy of the inam title deed No. 633 granted to the manager for the time being of the pagoda of Sri Panchavatiswaraswami. Exhibit B-3 dated 18th August, 1884, is a lease chit executed in favour of Appa Gurukkal with reference to the property granted in inam to Sri Panchavatiswaraswami temple. Exhibits A-2 to A-6 are kist receipts for the period 1936 to 1964 for payment of kist for the lands in question by the successors of Appa Gurukkal. At this stage it must be mentioned that Appa Gurukkal himself had no issue and after him one Annu Gurukkal was in charge of the poojas in the temple. Annu Gurukkal is the great grandfather of the two plaintiffs in the suit. After Annu Gurukkal one Swami Gurukkal succeeded him. The father of the plaintiffs was one Sambasiva Gurukkal who succeeded Swami Gurukkal. Sambasiva Gurukkal had two wives: the first plaintiff is the son through his first wife, while the second plaintiff is the son through his second wife. The first plaintiff herein filed a petition, Exhibit B-16, under section 57 (*b*) of the Madras Hindu Religious and Charitable Endowments Act XIX of 1951, before the Deputy Commissioner, Hindu Religious and Charitable Endowments, Thanjavur. That petition was numbered as O.A. No. 128 of 1957. In that petition the first plaintiff prayed for a declaration to the effect that he was holding his office in the temple of Sri Panchavatiswaraswami, Anathandavapuram, Mayuram Taluk, as a hereditary trustee, and he contended that the temple itself was a private temple, that it was constructed by his forefathers and that they were performing poojas in the temple hereditarily as well as managing the lands of an extent of 7 acres 88 cents which were obtained for the benefit of the temple by his forefathers as inam. To that petition no respondents were originally impleaded. The father of the first plaintiff, Sambasiva Gurukkal, as well as the second plaintiff, objected to the declaration prayed for by the first plaintiff, and they filed objection petitions before the Deputy Commissioner. Thereafter they, as well as the legal representatives of another brother of the first plaintiff, were impleaded as respondents to the said petition. They put forward the contention that, so long as Sambasiva Gurukkal was alive, the first plaintiff was not entitled to claim to function as a hereditary trustee of the temple and that consequently the declaration prayed for by the first plaintiff should not be granted. They affirmed the stand taken by the first plaintiff that the trusteeship to the temple was hereditary, but their case was that, so long as the father was alive, the first plaintiff could not claim to be a trustee. They, however, prayed that, in the event of the first plaintiff being declared as a hereditary trustee, they should also be declared as hereditary trustees along with the first plaintiff. This petition filed by the first plaintiff came to be disposed of by the Deputy Commissioner by his order dated 7th June, 1959, marked as Exhibit A-19 in these

proceedings. He posed two questions for consideration: (*i*) whether the office of trustee of the suit temple is hereditary; and (*ii*) whether the petitioner (first plaintiff) is entitled to get a declaration as prayed for. He held that no hereditary right to the office had been proved to have vested in the first plaintiff's family and that consequently the claim to that office by succession by the first plaintiff could not be recognised. Against this order of the Deputy Commissioner the first plaintiff preferred an appeal to the Commissioner and that appeal was dismissed by the Commissioner on 2nd July, 1960 under the original of Exhibit A-20. No further steps were taken to challenge the correctness of this order made under the original of Exhibit A-20. However, there is evidence to show that even after the dismissal of the petition of the first plaintiff, the officers of the Hindu Religious and Charitable Endowments Department themselves treated the first plaintiff as well as his father as hereditary trustees of the temple, issued notices to them calling upon them to pay contribution payable under the provisions of the Act, collected the same from them and also issued receipts therefor. Between 1960 and 1964 nothing appears to have happened. However, under the original of Exhibit B-24 dated 2nd December, 1964, the Area Committee, Hindu Religious and Charitable Endowments, Nagapattinam, appointed the second defendant herein as a trustee for the temple in question. By that time Sambasiva Gurukkal himself was dead. It was under these circumstances that the two plaintiffs, who are step-brothers, filed an application before the Deputy Commissioner, Hindu Religious and Charitable Endowments, under section 63 (*b*) of the Madras Hindu Religious and Charitable Endowments Act XXII of 1959, corresponding to section 57 (*b*) of Act XIX of 1951, for a declaration that they performed the functions as hereditary trustees of the temple in question. This petition (O.A. No. 21 of 1964) was dismissed by the Deputy Commissioner on 31st August, 1954, under the original of Exhibit A-22, holding that the decision in O.A. No. 128 of 1957 constituted *res judicata* with regard to the claim of the plaintiffs to hereditary trusteeship of the temple in question. Against that order the plainiffs preferred an appeal, A. No. 58 of 1964, on the file of the Commissioner, Hindu Religious and Charitable Endowments, and that appeal was dismissed by the Commissioner on 19th October, 1965, as evidenced by the original of Exhibit A-23. It was thereafter that, pursuant to the provisions of section 70 of Act XXII of 1959, the present suit was instituted by the plaintiffs for setting aside the orders of the Deputy Commissioner and the Commissioner referred to above.

2. The appellant herein, in the written statement, filed before the trial Court, contended that the plaintiffs were not the hereditary trustees of the temple, and that apart from that fact, that question could not be agitated again in view of the finality of the orders in O.A. No. 128 of 1957 and the appeal arising therefrom. The third respondent herein (the second defendant) filed an independent written statement putting forward the contention that the plaintiffs and their forefathers were not trustees of the temple in question, that they were only poojaries of the temple, that it was the villagers who had been in management of the temple and its properties, that the villagers had appointed trustees to the temple for that purpose and that lease deeds had been executed by the tenants with reference to the suit property in favour of one Sundarappier as well as one Sundaresa Iyer, who had been appointed as trustees of the temple by the villagers.

On the basis of these pleadings, the learned Subordinate Judge framed the following issues for trial:

1. Whether the plaintiffs are the hereditary trustees of the suit temple?

2. Whether the suit claim is barred by reason of the order of the Deputy Commissioner in O.A. No. 128 of 1957 and appeal therefrom?

3. To what relief are the plaintiffs entitled ?

On a consideration of the oral and documentary evidence placed before him, the learned Subordinate Judge, by his judgment and decree dated 30th November, 1966, answered both issues 1 and 2 in favour of the plaintiffs and decreed the suit as prayed for, setting aside the orders of the Deputy Commis-

sioner and Commissioner, dated 31st August, 1964 and 19th October, 1965 respectively. It is against this judgment and decree that the present appeal has been preferred by the first defendant in the suit.

4. As in the trial Court, the two points that arise for consideration in this appeal are (*i*) whether plaintiffs 1 and 2 are the hereditary trustees of the suit temple, and (*ii*) whether the suit claim is barred by reason of the order of the Deputy Commissioner in O.A. No. 128 of 1957 and the order of the Commissioner in appeal therefrom?

5. Before proceeding to consider these two points separately, we may immediately mention that the judgment of the learned Subordinate Judge, though long, is rambling, and it is difficult to find out where he was referring to the arguments advanced before him and where he was recording his own conclusions thereon. In view of this, we ourselves have gone through the entire materials placed before the Court and arrived at our own independent conclusions on the controversy before the trial Court.

6. As far as the first point is concerned, we have already referred to Exhibits B-1, B-2, A-1 and A-2 to A-6, and the conduct of the officers of the Department itself in recognizing and dealing with the plaintiffs and their father as trustees of the temple, demanding contributions from them, collecting the contributions and issuing receipts therefor. Having regard to the evidence afforded by Exhibits B-1, A-1, B-2 and A-2 to A-6, it would follow that it was the plaintiffs and their forefathers who were in possession and management of the temple and its properties. However, the learned Counsel for the appellant brought to our notice that the trial Court has not considered certain material pieces of evidence, such as, Exhibits B-7 to B-10, B-13, B-15 and B-23, showing that the villagers were managing the properties and appointing trustees in that behalf We are unable to hold that any one of these documents establishes that the villagers did any act in the management of the temple and its properties. Exhibit B-7 dated 14th July, 1917 is a registered *paguthi* chit executed by one Rangaswami Padayachi, in favour of Sambasiva Iyer. In this document Sambasiva Iyer, has been described as the agent of Sri Panchavatiswaraswami Temple. Exhibit B-8 is another registered rent deed executed by one Srinivasa Pillai, in favour of one Sundarappier, who is described as the trustee of the temple in question. Exhibit B-9, dated 21st January, 1924 is yet another registered *paguthi* deed executed by one Kalayanarama Iyer in favour of Sundarappier, described as the trustee of the temple in question. Exhibit B-10, dated 26th March, 1925 is a certified copy of the lease deed executed by one Rathnaswami Padayachi, in favour of trustee Sundarappier. Exhibit B-13, dated 28th December, 1930 is yet another registered rent deed executed by Rathna Padayachi, in favour of Sundarappier. Exhibit B-15, dated 29th May, 1946 is a list of jewels of the plaint temple countersigned by the father of the plaintiffs, *viz*., Sambasiva Gurukkal. The only significance that was claimed with reference to this document was that Sambasiva Gurukkal has not been described there as the trustee of the temple and that, if Sambasiva Gurukkal, was the trustee of the temple there was no occasion for the preparation of this list. Exhibit B-23 is the minutes book said to relate to the plaint temple and its affairs, maintained by the villagers. We are not able to place any reliance whatever on any one of these documents for more than one reason. In the first place, it was the second defendant who put forward these documents in his written statement itself in support of his case that the plaintiffs or their forefathers were not in management of the temple in question, but, notwithstanding this, the second defendant did not go into the box to give evidence on behalf of himself or on behalf of the first defendant. Only one A. K. Narayanaswami Iyer, was examined as D. W. 1, on behalf of the defendants. The failure of the second defendant to go into the box to give evidence in support of the case put forward by him in the written statement was for obvious reasons. On 31st October, 1957 admittedly the second defendant had not been appointed as a trustee of the temple by the Area Committee. He has given a statement before

the Inspector, Hindu Religious and Charitable Endowments, Mayuram, and that statement has been marked as Exhibit B-4. In this statement he had categorically and clearly stated that it was the plaintiffs and their father Sambasiva Gurukkal and their forefathers who were performing the poojas in the temple as well as functioning as trustees of the temple and that at no point of time did the villagers have anything to do with the management of the temple and its properties. The stand taken by the second defendant in his written statement was totally contrary to the statement made by him in Exhibit B-4 and it was precisely for this reason that the second defendant did not choose to go into the box to give evidence in support of his case put forward in his written statement. On the other hand, one A. K. Narayanaswami Iyer, as already pointed out, has been examined as D.W. 1. He stated in his evidence that the villagers had appointed Sundarappier, as trustee of the temple and that he was in management of the temple and its properties, receiving rents from the various persons who as already referred to, had executed *paguthi* chits in his favour. However, he categorically admitted that he did not know whether any receipts were issued for the receipt of rents and that he did not know it personally. In one place he stated that Sundarappier, attended to the affairs of the temple for a period of forty-five years and that he died in 1939. If so, Sundarappier should have been in management of the temple and its properties even during the close of the nineteenth century, but there is no evidence whatever to show that Sundarappier had anything to do with the temple and its properties, before Exhibit B-8 dated 8th November, 1921. He further admitted that in Exhibit B-23 there was no mention of any person as being the trustee of the suit temple. The learned Subordinate Judge, who had occasion to watch this witness and notice his demeanour has chosen not to place any reliance on his evidence. We entirely agree with this conclusion of the learned Subordinate Judge for the simple reason that D.W. 1 has not proved, with reference to his personal knowledge, any of the transactions on which reliance has been placed, and there is absolutely no evidence, independent of these documents, that Sundarappier or the villagers were in management of the temple and its properties, were receiving the income from the temple properties and were applying such income in the performance of poojas and other festivals connected with the temple in question. The result is that there is absolutely no evidence to show that the villagers had anything whatever to do with the temple and its properties. On the other hand, the evidence adduced on the side of the plaintiffs is categorically to the effect that the plaintiffs and their forefathers alone were in sole and exclusive management of the temple and its properties and that at no point of time did the villagers interfere with such management. As a matter of fact, none of the documents on which reliance has been placed on behalf of the defendants was put to P.W. 1 and no questions were asked about it. To the general questions put to him, P.W. 1 replied that neither Sundarappier nor Sundaresa Iyer was ever in management of the temple and its properties as trustee.

7. There is one other significant circumstance which would probabilise the case of the plaintiff and negative the case of the appellant. We have already referred to the order of the Deputy Commissioner, dated 7th June, 1959 in O.A. No. 128 of 1957. In that order the Deputy Commissioner himself has recorded a categorical finding that it was the first plaintiff and his father and their forefathers who had been in possession of the temple and its properties. He has recorded in the course of his order:

> "No doubt, to the knowledge of the public, the Archakas have been in possession for over hundred years rendering pooja services. There have been no other endowed properties for the temple as to suggest other acts of management to the public, and even assuming it implies management to the exclusion of the public, it is not by a third party but by an office-holder which cannot prevail against the right of the public to partake in it when they choose to do so being a public temple. The public interested themselves only in the worship and in giving donations for the deity".

These observations of the Deputy Commissioner himself clearly establish that nobody other than the first plaintiff and his forefathers was in possession and management of the temple and its properties, and the Deputy Commissioner rejected the case of the first plaintiff solely on the ground that he and his ancestors were not recognized as trustees either by the Government or by any other authority.

7-A. A Bench of this Court had to consider the question whether there is anything illegal or improper in Archakas being trustees of small temples in *Muthuswami Gurukkal* v. *Aiyawami Thevar*[1]. The following head-note itself brings out the principle of the decision:

> "There is nothing illegal in hereditary trusteeship and pujariship being combined in the same person, especially in the case of small temples where there has been no interference or control by any of the villagers of the place. In the case of small village temples, where the temple property is of insignificant value and the income is hardly sufficient even to meet the routine expenses of the temple, if the Archaka or Poojari is left in management of the temple lands and the affairs of the temple without any interference by any of the villagers for a long number of years, it has to be presumed that with the consent and acquiescence of the worshippers of the village the pujari is the trustee as well. In such a case it must be held that the poojari managing the lands and affairs has made out his right to hereditary trusteeship and the interests of the temple are not likely to suffer, when the person concerned admits that the lands are temple lands and has never set up any rights to them as his own property".

8. In this case, as we already pointed out, there is no dispute whatever that at all stages the plaintiffs were the hereditary poojaries of the temple. As already pointed out again, the evidence clearly establishes that it was those hereditary poojaries who were in management of the temple and its properties and that at no stage did the villagers interfere with such management. Under these circumstances, we are clearly of the opinion that the principle laid down in the above decision applies to the facts of this case and that consequently it is established that the plaintiffs are the hereditary poojaries and trustees of the suit temple.

1. (1964) 2 M.L.J. 660.

9. This takes us to the second point posed for consideration, namely, whether the order passed by the Deputy Commissioner in O.A. No. 128 of 1957 (Exhibit A-19) is a bar to the plaintiffs herein to agitate their claim to hereditary trusteeship to the temple in question. The learned Counsel for the appellant contends that the Act provided for a right of suit against the order of the Commissioner in appeal, that no such suit having been filed against the order of the Commissioner (Exhibit A-20), that order has become final and that therefore the plaintiffs were not entitled to reopen and reagitate the question by filing a fresh application before the Deputy Commissioner under section 63 (*b*) of Madras Act XXII of 1959 in O.A. No. 21 of 1964. The learned Subordinate Judge considered this contention and rejected it. We are clearly of the opinion that the conclusion of the learned Subordinate Judge in this behalf is correct. Section 57 (*b*) of Act XIX of 1951 enacted :

> Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters:
>
> ....
>
> (*b*) whether a trustee holds or held office as a hereditary trustee.

The scope of this provision came up for consideration by this Court in *Sastri Ammal* v. *Pravalavarna Naicker*[1], where Rajagopalan, J., held:

> "If the dispute is whether the office of trustee of a given religious institution is hereditary, it would certainly come within the scope of section 57 (*b*). In my opinion that is all that section 57 (*b*) provides for. A dispute between the claimants to succeed to an office, which it is admitted on all hands is

1. (1955) 2 M.L.J. 612 : (1955) 68 L.W. 777: I.L.R. (1957) Mad. 631 : A.I.R. 1956 Mad. 146.

hereditary, is, in my opinion not within the scope of section 57 (*b*) of Act XIX of 1951".

10. This view was shared by Veeraswami, J. (as he then was) in *Chinnathambi Moopan* v. *Mamundi Moopan*[1]. We ourselves have approved of the correctness of the view of Rajagopalan, J., in our judgment in (*Venugopala Chettiar* v. *The Commissioner, H. R. & C. E. Madras*)[2]. Consequently it is well-settled that the scope of the jurisdiction of the Deputy Commissioner under section 57 (*b*) of Act XIX of 1951 was to decide whether the trusteeship in relation to a religious institution was hereditary or not and not to decide whether a particular person was entitled to function as a hereditary trustee at a particular point of time with reference to a temple the hereditary nature of the trusteeship of which had been admitted. It is against the background of this legal position that we have to consider the effect of the order of the Deputy Commissioner in O.A. No. 128 of 1957 and the order of the Commissioner in appeal arising therefrom, as evidenced by Exhibits A-19 and A-20. A copy of the petition filed by the first plaintiff in O.A. No. 128 of 1957 has been marked in this case as Exhibit B-16. In that petition the first plaintiff put forward the categorical contention that he and his forefathers had been functioning not only as poojaries of the temple but also as hereditary trustees of the temple. It was only on the basis of this contention that he sought for a recognition of his hereditary status and rights at the hands of the Deputy Commissioner and for a declaration that he was holding his office in the temple of Sri Panchavatiswaraswami, Anathandavapuram, as a hereditary trustee. As we pointed out already, he had not impleaded any persons as respondents in that petition, though subsequently, his father Sambasiva Gurukkal, his step-brother Subramania Gurukkal, and the legal representatives of another deceased brother, Kailasa Gurukkal, were impleaded as respondents. In the counter filed by those parties, they also asserted along with the first plaintiff that trusteeship to the temple in question was hereditary, and the only contention they put forward was that, so long as Sambasiva Gurukkal, the father was alive, the first plaintiff was not entitled to claim to function as a trustee. Alternatively they contended that, if, for any reason, the Deputy Commissioner was to recognize the first plaintiff also as a hereditary trustee even during the lifetime of Sambasiva Gurukkal, the father, then the others also must be recognized as hereditary trustees. The result was that before the Deputy Commissioner in O.A. No. 128 of 1957 there was no controversy or dispute about the hereditary character of the trusteeship to the temple. All the persons who had been made parties to O.A. No. 128 of 1957 unanimously claimed that trusteeship to the temple in question was hereditary. Consequently the only matter in controversy was whether the first plaintiff herein could be recognized as a hereditary trustee even during the lifetime of his father, Sambasiva Gurukkal. Therefore the Deputy Commissioner was not called upon to decide whether the trusteeship of the temple was hereditary or not; what he was called upon to decide was whether during the lifetime of Sambasiva Gurukkal the first plaintiff could be recognized as a hereditary trustee or not. On the first point, if there was controversy, the Deputy Commissioner would have jurisdiction to decide, and on the second point he had no jurisdiction at all. Under these circumstances, we are clearly of the opinion that the Deputy Commissioner should have dismissed. O.A. No. 128 of 1957 on the ground that he had no jurisdiction to decide as to who functioned as hereditary trustee at a particular point of time, where trusteeship of the temple was admittedly hereditary. Having regard to the scope of the controversy between the parties in O.A. No. 128 of 1957 there was neither occasion nor necessity for the Deputy Commissioner to go into the question whether the trusteeship of the temple in question was hereditary or not. Unfortunately, as we already pointed out, the Deputy Commissioner posed for himself the first question for consideration, whether trusteeship of the temple was hereditary or not, even though that ques-

1. (1966) 1 M.L.J. 361.
2. Appeal No. 479 of 1967, dated 27th August, 1973.

tion did not at all arise for consideration before him. It is against this background that we have to consider whether that order and the order of the Commissioner on appeal therefrom are a bar to the filing of a fresh petition under section 63 (*b*) of Act XXII of 1959 by the plaintiffs herein. It is admitted that there were no provisions in Act XIX of 1951 to the effect that the order of the Commissioner on appeal shall be final, if no suit was filed to set aside the same, as contemplated by the Act. Consequently, the question will be a general one, namely, whether the order of the Deputy Commissioner in O.A. No. 128 of 1957, and of the Commissioner in appeal, would constitute *res judicata* so as to prevent the plaintiffs herein from reagitating the same question under the provisions of section 63 (*b*) of Act XXII of 1959. The principles of *res judicata* in relation to suits have been enunciated in section 11 of the Code of Civil Procedure. However, the provisions contained in that section are not exhaustive, and consequently the general principles of *res judicata* would apply to other proceedings even though section 11 of the Code of Civil Procedure would not in terms apply. For the purpose of the application of the general principles of *res judicata* a particular matter should have been directly and substantially in issue in former proceedings so as to bar the reconsideration of the same matter in subsequent proceedings. As we pointed out already, in this case the question whether the trusteeship of the temple was hereditary or not was not in issue between the parties in O.A. No. 128 of 1957, and consequently the Deputy Commissioner had no jurisdiction whatever to decide a question which was not raised before him. Therefore, if the Deputy Commissioner had rendered a finding on that question which was not in controversy or dispute before him, his finding cannot be said to be final or conclusive so as to bar the agitation of the same question in a properly framed proceedings instituted subsequently. In this view, we are clearly of the opinion that the order of the Deputy Commissioner in O.A. No. 128 of 1957 and the order of the Commissioner on appeal arising therefrom did not bar the application filed by the plaintiffs herein before the Deputy Commissioner under section 63 (*b*) of Act XXII of 1959.

11. The result is that there are no merits in the appeal and it is accordingly dismissed with costs.

12. While decreeing the suit instituted by the plaintiffs herein, the learned Subordinate Judge has not awarded costs in favour of the plaintiffs. Questioning this, the plaintiffs have preferred a memorandum of cross-objections. In view of the conclusion we have come to on the merits of the controversy, once the suit was decreed, the learned Subordinate Judge, except for reasons to be recorded to the contrary, ought to have awarded costs in favour of the plaintiffs. The learned Subordinate Judge himself has not given any reasons whatever in his judgment for not awarding costs in favour of the plaintiffs. However, as we have held that the plaintiffs were entitled to succeed, we are of the opinion that the learned Subordinate Judge should have awarded costs in favour of the plaintiffs. The memorandum of cross-objections is therefore allowed, the result of which is that the suit is decreed with costs throughout. But there will be no order as to costs in the memorandum of cross-objections.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*M. M. Ismail and Natarajan, JJ.*

C. S. Kumaraswami Goundar .. *Appellant**

v.

Aravagiri Goundar and another .. *Respondents.*

Registration Act (XVI of 1908), *sections* 17 (*i*) (b), 49—*Deed of partition—Not registered—If receivable in evidence—Admissible for collateral purpose—Possession of property—Nature and character of possession—"Collateral transaction"—Meaning of.*

A deed of partition which required registration under section 17 (*i*) (b) of

*Appeal No. 955 of 1966. 10*th April,* 1973.

the Registration Act XVI of 1908 was not actually registered. A question came up for consideration to what extent section 49 of the Act prohibits the reception of the document as evidence for a collateral purpose.

Held, that if a document deals with or refers to more than one transaction and if the principal transaction happens to be a creation, declaration, assignment, limitation or extinguishment of any right, title or interest to or in immovable property as contemplated by section 17 (*i*) (b) of the Registration Act, and if there is also a transaction or purpose collateral to the same, the document can be certainly used in evidence for the purpose of showing the collateral purpose or transaction with reference thereto. [*Para*. 9.]

An unregistered partition deed could not be admitted in evidence to prove the terms of the partition; it could certainly be admitted in evidence for proving the division in status and the fact of partition. Taking possession of the shares allotted to each one of the parties at the partition would be a purpose collateral to the purpose of partition and such taking possession not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, would not require registration, and therefore an unregistered deed of partition could be used for the collateral purpose, namely, for proving the nature and character of the possession of the respective items of properties in the hands of the members of the coparcenary.

[*Para*. 10.]

A collateral transaction within the meaning of the proviso to section 49 of the Act XVI of 1908 means a transaction other than the transaction affecting immovable property, but is in some way connected with it. [*Para*. 10.]

In the instant case the unregistered deed of partition was held admissible in evidence for the collateral purpose, namely, to determine the nature of the possession of the properties. [*Para*. 22.]

Cases referred to:—

Rajangam Ayyar v. *Rajangam Ayyar*, I.L.R. 46 Mad. 373: 50 I.A. 134: 44 M.L.J. 745: A.I.R. 1922 P.C. 266; *Bai Gulabbai* v. *Shri Datagarji*, (1907) 9 Bom.L.R. 393; *Ramalaxmi* v. *Bank of Baroda*, A.I.R. 1953 Bom. 50; *Girija Nandan Singh* v. *Girdhari Singh*, A.I.R. 1951 Pat. 277; *Nani Bai* v. *Gita Bai*, (1959) S.C.R. 479: 1958 S.C.J. 925 : A.I.R. 1958 S.C. 706; *Subbu Naidu* v. *Varadarajulu Naidu*, I.L.R. (1947) Mad. 694 : (1947) 1 M.L.J. 90 : A.I.R. 1948 Mad. 26; *Nadapena Appanna* v. *Saripilli Venkatasami*, I.L.R. (1924) 47 Mad. 203 : 45 M.L.J. 667 : A.I.R. 1924 Mad. 292 ; *Kandaswami* v. *Ponnuswami*, A.I.R. 1929 Mad. 16; *Varada Pillai* v. *Jeevarathnammal*, 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.) : 38 M.L.J. 313: A.I.R. 1919 P.C. 44; *Kirpal Kuar* v. *Bachan Singh*, (1958) S.C.R. 948 : 1958 S.C.J. 438: A.I.R. 1958 S.C. 199 ; *Padma Vithoba Chakkayya* v. *Mohd. Multani*, (1963) 3 S.C.R. 229 : (1963) 2 S.C.J. 172: A.I.R. 1963 S.C. 70.

Appeal against the decree of the Subordinate Judge, Erode, dated 19th November, 1965 in Original Suit No. 59 of 1962.

K. Parasaran, for Appellant.

K. Doraiswami, for 1st Respondent.

K. Sarvbhauman, and *A. K. Kumaraswami*, for 2nd Respondent.

The Judgment of the Court was delivered by

Ismail, J.—The plaintiff in O.S. No. 59 of 1962 on the file of the Court of the Subordinate Judge of Erode, is the appellant herein. The appellant and one Nallaswami Goundan were brothers, being the sons of one Sengoda Goundar. Between the appellant and Nallaswami Goundan there was a partition of all the joint family properties on 24th November, 1924 under a document marked as Exhibit B-1 in these proceedings. The document recited that with the help of mediators the properties of the joint family were divided as between them, that each of them took possession of the respective shares allotted to them and that from that day onwards one party had no right whatever to trespass into the property of the other. The properties themseves are divided into and described as two schedules, one schedule being allotted to each brother. There

was one provision contained in the document, namely, that, if any of the parties went back on the partition arrangement, he would have to pay a sum of Rs. 5,000 to the other. In 1932 Nallaswami Goundan died and the first defendant in the suit is the only son of Nallaswami Goundan. The second defendant in the suit is a subsequent alienee of survey No. 122/B which is item No. 2 in the schedule to the plaint. The present suit was instituted for partition of the properties that originally belonged to the appellant and the deceased Nallaswami Goundan. The case of the appellant as set out in the plaint was that the partition entered into between the parties on 24th November, 1924 was not intended to be a final partition between the parties and that the agreement had always been treated as a matter of convenience subject to alteration between them. He also put forward the contention that a power had been reserved to ask for a repartition of the properties and that that itself was evidence of the fact that no final partition had been effected on 24th November, 1924. He further contended that the parties themselves treated the properties as if they had not been finally partitioned, and in support of that contention, relied on an order of the Subordinate Judge of Coimbatore, in C.C. No. 434 of 1953 (O.P. No. 524 of 1953) relating to a claim to compensation in respect of acquisition of certain lands.

2. As against this the first defendant filed a written statement putting forward the contention that the partition, dated 24th November, 1924 was a full and complete partition and that therefore the appellant had no right to go back upon the same. He also put forward an alternative contention that, in any event, he had acquired title to the properties allotted to the share of Nallaswami Goundan under Exhibit B-1 by adverse possession. With regard to the claim put forward by the appellant, that the order of the Subordinate Judge of Coimbatore in C.C. No. 434 of 1953 had decided that the appellant also had a share in the compensation amount, he contended that the said decision was not rendered on merits and to which he himself was not a party and that therefore it was not binding on him.

3. The second defendant filed a separate written statement putting forward a similar contention, namely, that the partition, dated 24th November, 1924 was a complete and final partition, that pursuant to the partition the parties had taken possession of the respective items of properties allotted to them, that they had been in complete and absolute enjoyment of those properties, and that survey No. 122/B was dealt with by Nallaswami Goundan pursuant to the partition, which had ultimately come to the second defendant after a series of alienations.

4. It is on these pleadings that the trial Court framed the following issues:

1. Whether the deed dated 24th November, 1924 mentioned in paragraph 3 of the plaint was never intended to be a final partition between the brothers?

2. In any event, whether the partition dated 24th November, 1924 has been acted upon, and, if so, whether the plaintiff is estopped from going back upon it?

3. Whether the plaintiff is entitled to the partition and separate possession prayed for?

4. Whether the plaintiff is entitled to 7/12 share of item 2?

5. Whether the decision in C.C. No. 434 of 1953 on the file of Sub-Court, Coimbatore, is valid and binding upon the defendants?

6. Whether the first defendant has perfected title of the properties allotted to his father under the partition arrangement dated 24th November, 1924 for the reasons stated in the written statement of the first defendant?

7. To what relief are the parties entitled?

5. The learned Subordinate Judge, after considering the materials placed before him, came to the conclusion that the partition dated 24th November, 1924 was intended to be a final partition between the brothers. On issue No. 2 his conclusion was that the said partition had been acted upon and that the plaintiff was not entitled to go back upon the same. In view of his findings on issues Nos. 1 and 2, the learned Subordinate Judge held

that the appellant was not entitled to partition and separate possession as prayed for. On issue No. 4 he held that the second defendant had title to item No. 2, and that, in any event, he had perfected title to the same by adverse possession. On issue No. 5 his conclusion was that the order of the learned Subordinate Judge in C.C. No. 434 of 1953 not being one on merits did not bind the defendants in the suit. On issue No. 6 his conclusion was that the first defendant had perfected title to the properties allotted to the share of his father at the partition dated 24th November, 1924 by adverse possession. In view of these findings the suit instituted by the appellant was dismissed on 19th November, 1965. It is against this judgment and decree the present appeal has been preferred by the plaintiff in the suit.

6. Mr. K. Parasaran, the learned Counsel for the appellant, addressed only one argument before this Court. His argument is this. Exhibit B-1 was not admittedly registered, though it required registration under section 17 (*i*) (b) of the Registration Act (XVI of 1908). For want of registration that document was not admissible in evidence under section 49 of the Registration Act and therefore the appellant was entitled to a decree for partition. With regard to the claim of adverse possession put forward by the first defendant, the contention of Mr. Parasaran is that the parties being co-owners, mere adverse possession is not enough and that the first defendant must prove ouster which he has not established in this case. His further contention is that Exhibit B-1 cannot be admitted in evidence even for the collateral purpose of finding out the character of the possession of the properties allotted to the shares of Nallaswami Goundan under Exhibit B-1 in the hands of Nallaswami Goundan and after his death in the hands of the first defendant.

7. We are clearly of the opinion that there is no substance in any of these contentions. Before we go to section 49 of the Registration Act, it is necessary to refer to certain circumstances and facts emerging from the evidence. As far as the case of the appellant is concerned, even though he purported to put forward the case that there was no final partition on 24th November, 1924 the very halting and prevaricating stand taken by him in the plaint itself clearly shows that there was a final partition on 24th November, 1924. In paragraph 3 of the plaint he states:

> "On the 24th of November, 1924, the plaintiff and his brother, the aforesaid Nallaswami Goundar, entered into a sort of written partition agreement".

In the same paragraph he states:

> "As a matter of fact, the agreement has always been treated as a matter of convenience subject to alteration, at any time, as and when the parties felt the need for it".

In paragraph 4 this is what he states:

> "After the advent of the Lower Bhavani canal most of the properties that fell to the share of the said Nallaswami Goundan have been included in the ayacut. Though at the time of the aforesaid agreement the division for the sake of convenience was fair and equitable, after the advent of the Lower Bhavani canal the conditions have changed to such an extent that the division is no longer fair and equitable".

These allegations in the plaint cannot be understood except on the basis that there was a final partition between the parties on 24th November, 1924 and that certain items of properties fell to the share of the deceased Nallaswami Goundan. The position is made clear by the allegations contained in paragraph 5 as well. In that paragraph the plaintiff states:

> "The aforesaid Nallaswami Goundan, brother of the plaintiff, died in or about the year 1932. The first defendant, who is the only heir and legal representative of the deceased, succeeded his father, and is in possession and enjoyment of his share".

This again emphasises the finality of the partition arrangement made on 24th November, 1924. If that had not been so, it is not possible to comprehend how the properties could have fallen to the 'share' of Nallaswami Goundan and how

the first defendant succeeded to the "share" of Nallaswami Goundan and was in possession of the several items of the properties. Having regard to this strange stand of the appellant, there can be no doubt whatever that there was a final partition between the appellant and the deceased Nallaswami Goundan on 24th November, 1924. The subsequent conduct of the parties also emphasises this fact. As pointed out already, Nallaswami Goundan died in 1932. After his death, Exhibit B-4, dated 3rd April, 1933, being an agreement, was entered into between the appellant on the one hand, and the mother of the first defendant, as guardian of the first defendant, on the other. This agreement expressly refers to the earlier partition of 24th November, 1924 and purports to divide the properties left undivided at that partition. We shall have occasion to refer to similar conduct and admissions of the appellant in another context in the course of this judgment and all that we are interested in pointing out at this stage is that the conduct of the appellant himself throughout, from 1924 upto the date when he chose to call for a re-partition, was consistent only with the position that there was a final partition in 1924 under Exhibit B-1, dated 24th November, 1924.

8. Now let us take the question of law argued by Mr. Parasaran with reference to sections 17 and 49 of the Registration Act. It is conceded by both sides that Exhibit B-1, being a partition deed, requires registration under section 17 (1) (*b*) of the Act. The only question for consideration is to what extent section 49 of the Act prohibits the reception of Exhibit B-1 as evidence. Section 49 is as follows:

> No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered, shall—
>
> (*a*) affect any immovable property comprised therein ; or
>
> (*b*) confer any power to adopt; or
>
> (*c*) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

9. One thing that may be seen immediately is that section 49 (*a*) is a substantive law declaring that a document required by section 17 to be registered shall not affect any immovable property comprised in the document, if the document is not registered. On the other hand section 49 (*c*) is a provision of law dealing with evidence which states that such an unregistered document cannot be received as evidence of any transaction affecting such property. A striking feature to be noticed in this context is that the section does not provide for a total prohibition of the reception of the document as evidence at all. As pointed out by Mulla in his Commentaries on the Registration Act, Eighth Edition, at page 198:

> "It is important to observe that the section does not say that an unregistered document which requires to be registered shall not be received *in* evidence. It says *as* evidence of any transaction affecting the property. It may be received *in* evidence for a collateral purpose even if that purpose does indirectly affect the property."

The condition precedent for the invocation of section 49—omitting the reference to the Transfer of Property Act—is that it must be a document which requires registration under section 17 of the Act. For section 17 to apply, the document must be one which purports or operates to create, declare, assign, limit or extinguish any right, title or interest, of the value of one hundred rupees and upwards, to or in immovable property. Section 49 prohibits the use of such document, when unregistered, as evidence of the creation, declaration, assignment, limitation or extinguishment of any right, title or interest of the value of one hundred rupees

and upwards to or in immovable property. The section had nothing whatever to do with the reception of such a document as evidence for any other purpose. This is made abundantly clear not merely by the language of the main part of the section, but also by the language of the proviso, which has been extracted above. Consequently the irresistible conclusion is that, if a document deals with or refers to more than one transaction and if the principal transaction happens to be a creation, declaration, assignment, limitation or extinguishment of any right, title or interest to or in immovable property as contemplated by section 17 (1) (*b*) of the Act, and if there is also a transaction or purpose collateral to the same, the document can be certainly used in evidence for the purpose of showing the collateral purpose or transaction with reference thereto. We shall now illustrate this construction of ours with reference to the case of actual partition.

10. A partition in a joint Hindu family may denote either of two things: (*i*) a division in status as between the members of the coparcenary; and (*ii*) an actual division of the properties belonging to the joint family by metes and bounds as between the different members of the family. The expression "partition" has been used indiscriminately to denote either one or the other of the two things. Once a partition of the properties by metes and bounds has taken place, naturally there will be the consequential transaction of the parties, to whom the properties have been allotted separately, taking possession of those properties. Thus it will be seen that in the case of an express-completed partition there will be three different stages: (*i*) the stage of effecting a division in status; (*ii*) the stage of dividing the properties by metes and bounds; and (*iii*) the stage of each party taking possession of the properties allotted to his share. As far as these three stages are concerned, it is conceded, having regard to the decided cases, that each and every one of them can be effected orally without there being a document. Even if there is a written document in respect of the first and third stages, then also it is conceded that the document does not require registration, because neither the division in status nor the actual taking possession of the properties can be said to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property. Therefore it is only with regard to the second stage, namely, division of properties in different shares and allotment thereof to the various members, if the same is reduced to writing, it requires registration under section 17 (1) (*b*) of the Act. Under the Hindu Law, it is well-settled that, severance in status can take place either by the unilateral declaration of one of the coparceners or by agreement between all the coparceners. Where severance is effected as above, it is not a transaction which requires any writing and even if it is effected by means of any instrument in writing, that will not fall within the scope of section 17 (1) (*b*) of the Act. Similar will be the position with regard to taking possession of the properties. From the very nature of the case, once a division of the properties by metes and bounds has taken place as between the members of a coparcenary and the parties take possession as exclusive owners of the respective items allotted to them, such a partition assumes a division in status having taken place between the parties. Therefore, though an unregistered partition deed cannot be admitted in evidence to prove the terms of the partition, it can certainly be admitted in evidence for proving the division in status and the fact of partition, as pointed out by several decisions based on the judgment of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar*[1]. Similarly, taking possession of the shares allotted to each one of the parties at the partition will be a purpose collateral to the purpose of partition and such taking possession not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, will not require registration, and therefore an unregistered deed of partition can be used for the collateral purpose, namely, for proving the nature and character of the possession of the respective items of properties in the hands of the members of the coparcenary. In *Bai Gulabbai* v. *Shri Datgarji*[2], it was pointed out that a

1. (1923) 50 I.A. 134: I.L.R. 46 Mad. 373: 44 M.L.J. 745 : A.I.R. 1922 P.C. 266.
2. (1907) 9 Bom.L.R. 393.

collateral purpose is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. Therefore a collateral transaction within the meaning of the proviso to section 49 of the Act means a transaction other than the transaction affecting immovable property, but which is in some way connected with it. In *Ramlaxmi* v. *Bank of Baroda*[1], the Bombay High Court pointed out:

> "The expression 'collateral' transaction is used not in the sense of an ancillary transaction to a principal transaction or a subsidiary transaction to a main transaction. The root meaning of the word 'collateral' is running together or running on parallel lines. The transaction as recorded would be a particular or specific transaction. But it would be possible to read in that transaction what may be called the purpose of the transaction and what may be called a collateral purpose, the fulfilment of that collateral purpose would bring into existence a collateral transaction, a transaction which may be said to be a part and parcel of the transaction but none the less a transaction which runs together with or on parallel lines with the same.
>
> An obvious illustration of this is the transaction which is recorded in the memo. of petition before us. The transaction therein recorded was a transaction of partition of the movable and immovable properties belonging to the joint family. These properties were allotted to the shares of the respective members of the family. A partition was in fact effected by this document and that transaction took place under the terms of the document, itself. The memo. of partition thus required registration and not being registered could not be admitted in evidence under the terms of section 49, Registration Act. There was, however, involved in this transaction itself a collateral transaction, *viz.*, that of the severance of the joint status which transaction by itself did not require to be registered by any law for the time being in force. A severance of joint status could be effected under Hindu law in various modes, one of the modes being an unequivocal expression of an intention to separate. A partition could be effected orally as well as by a written document, and it would be open to party to prove that there was a partition or severance of joint status effected between the parties without its being effected by a registered instrument. A partition, *i.e.*, severance of joint status thus would be a collateral transaction, and would certainly fall within the proviso to section 49, Registration Act."

11. The same view was taken by a Bench of the Patna High Court in *Girija Nandan Singh* v. *Girdhari Singh*[1]. That Court, after referring to a number of decisions, pointed out:

> "The word 'partition' involves two concepts: (*i*) change of status; and (*ii*) division of property. Severance of status does not require to be proved by any documentary evidence at all, nor is it necessary that for the purpose of proving actual division of property between the members of a joint family, a written instrument is essential. Where, therefore, there is evidence that there was an actual division of property between the parties, and that they went into possession of their respective shares in accordance with that division, and there are also circumstances to show that the conduct of the parties is inconsistant with anything except the factum of separation, a Court of law may very well hold, apart from any instrument of partition, that the parties had separated in status and effected partition of the family properties."

That will be the *prima facie* construction of section 49 of the Act.

12. The above view of ours on partition in a Mithakshara family also derives support from the following observations of the Supreme Court in *Nani Bai* v. *Gita Bai*[2]:

> "Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary,

1. A.I.R. 1953 Bom. 50.

1. A.I.R. 1951 Pat. 277.
2. 1958 S.C.J. 925: 1959 S.C.R. 479: A.I.R. 1958 S.C. 706.

that is to say, what was once a joint title has become a divided title, though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst cosharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but, if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus within the mischief of section 17 (1) (*b*), the material portion of which was been quoted above. But partition in the former sense of defining the shares only without specific allotments of property, has no reference to immovable property. Such a transaction only affects the status of the member or the members who have separated themselves from the rest of the coparcenary. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property, may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, that is to say, the partition in the latter sense, it does not come within the purview of section 17 (1) (*b*), because, so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction does not purport or operate to do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under section 17, and would, therefore, not come within the mischief of section 49 which prohibits the reception into evidence of any document 'affecting immovable property.' It must, therefore, be held that those documents have rightly been received in evidence for that limited purpose."

13. We called upon Mr. Parasaran to show us any authority of any Court taking a contrary view. As a matter of fact, as far as this Court is concerned, there is a direct decision of a Bench of this Court in *Subbu Naidu* v. *Varadarajulu Naidu*[1]. That case dealt with a koorchit which the Court considered to be a deed of partition, which was not registered. This Court, while holding that the document could not be received in evidence for proving the terms of the deed of partition, held that it could be received in evidence for proving the character of the possession of the properties in the hands of the respective members of the family. This is what this Court pointed out:

> "Lastly it was contended that the document was admissible to prove the adverse character of the first defendant's possession of the lands which were allotted to him under the koorchit, though such allotment was ineffectual for want of registration. This contention must be accepted, as it is supported by numerous decisions. Vide—*Nadapena Appanna* v. *Saripilli Venkataswami*[2], *Kandaswami* v. *Ponnuswami*[3], purporting to be based on the Privy Council ruling in *Varada Pillai* v. *Jeevarathnammal*[4]. An attempt was made on behalf of the respondents to show that, on a close examination of the decision of their Lordships, it lends no support to the view expressed in those cases, but, as pointed out by Sir Dinshaw Mulla in his commentaries on the Registration

1. (1947) 1 M.L.J. 90 : I.L.R. (1947) Mad. 694 : A.I.R. 1948 Mad. 26.
2. (1924) I.L.R. 47 Mad. 203 : 45 M.L.J. 667 : A.I.R. 1924 Mad. 292.
3. A.I.R. 1929 Mad. 16.
4. (1920) I.L.R. 43 Mad. 244 (P.C.): 46 I.A. 285 : 38 M.L.J. 313 : A.I.R. 1919 P.C. 44.

Act, that view has been accepted by almost all the High Courts in India, and we do not feel disposed to refer the point to a Full Bench, as we were invited to do, especially as the point is of no more than academic interest on the facts of this case."

14. Mr. Parasaran contended that none of the decisions referred to in the above passage dealt with a case of partition and that therefore those decisions could not be said to be authority for the view that an unregistered partition deed was admissible to prove the adverse character of the possession of one of the parties. Mr. Parasaran also invited our attention to the decision of the Supreme Court in *Kirpal Kuar* v. *Bachan Singh*[1], as taking the view that an unregistered partition deed could not be received in evidence for such a purpose. We are unable to accept this argument of Mr. Parasaran.

15. *Nadapena Appanna* v. *Saripilli Venkatasami*[2], dealt with a case of an unregistered mortgage deed. The following headnote itself shows what was decided in that case:

> "Held, that the deed, though unregistered, was admissible in evidence to show the character of the defendants' possession; that the defendants could be shown to have acquired only a limited interest as mortgagees by adverse possession; that, to prove the extent of the interest acquired by them by adverse possession, the terms of the mortgage asserted by them may be proved and such proof cannot be regarded as an attempt to prove the unregistered mortgage or to adduce secondary evidence of it, and the unregistered deed as well as other evidence was admissible for the purpose."

16. *Kandaswami Mudaliar* v. *Ponnuswami Mudaliar*[3], dealt with a case of an unregistered sale-deed, and a Bench of this Court took the view that such a sale-deed could be admitted to show the nature of the possession.

17. *Varada Pillai* v. *Jeevarathnammal*[4], dealt with a case of gift. The question there was whether there had been a valid gift of immovable property and whether the donee had acquired title by adverse possession. After referring to certain petitions reciting a gift which had been presented to the Collector praying for the registration of the properties in the name of the donee, the Judicial Committee held that, as a gift of immovable property was required to be made by a registered deed under section 123 of the Transfer of Property Act, the petitions could not be used as evidence of title, but it was permissible for the Court to look at them to ascertain the nature or character of the possession held by the person named in the petitions. The Judicial Committee referred to the question for consideration as follows:

> "It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani; for such gift must, under section 123 of the Transfer of Property Act, be made by a registered deed. Nor, having regard to section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December, 1911, after which date it passed to the defendant as her successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention; and their Lordships, after considering the evidence, have arrived at the same conclusion."

Finally the Judicial Committee observed:

> "It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani. In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Durai-

1. 1958 S.C.J. 438 : 1958 S.C.R. 948 : A.I.R. 1958 S.C. 199.
2. (1924) I.L.R. 47 Mad. 203 : 45 M.L.J. 667 : A.I.R. 1924 Mad. 292.
3. A.I.R. 1929 Mad. 16.
4. (1920) 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.) : 38 M.L.J. 313.

sani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt."

18. The Judicial Committee itself has not referred to the proviso to section 49 of the Registration Act. However, the Courts in India have construed the decision of the Judicial Committee as enabling the Court to receive an unregistered document as evidence of the nature and character of the possession in the hands of the person who purported to be the transferee of the interest created or declared under the document. In Mulla's Commentaries on the Registration Act, 8th Edn., at page 203, it is stated:

"Their Lordships did not refer to section 49, for the petition being mere recital, did not require registration, but the case shows that a document inadmissible as evidence of a transaction may be used as evidence for a collateral purpose. An unregistered deed of lease can be used for a collateral purpose to show the nature of possession. Tenancy agreement may be implied from the conduct. The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon, Delhi, and Jammu and Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it."

19. As we pointed out already, Mr. Parasaran invited our attention to the decision of the Supreme Court in *Kirpal Kaur* v. *Bachan Singh*[1], and relied on the following passage therein:

"In the present case Harnam Kaur had been in possession before the date of the document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the previous possession and to convert what had started as adverse, possession into a permissive possession and therefore, to give effect to the agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by section 49 of the Registration Act."

20. Mr. Parasaran's argument is that all these decisions dealt with a case where possession was given for the first time and that they did not deal with a case where the party was already in possession of the property. According to him, an unregistered document cannot be used in evidence for showing the change in the character of possession, but it could be used only for the purpose of showing the nature of the possession taken by a party. In support of this contention he refers to the fact that none of these decisions to which we have already drawn attention, except the decision in *Subbu Naidu* v. *Varadarajulu Naidu*[1], dealt with a case of partition among the members of a Hindu joint family. From one point of view, even though the members of a joint Hindu family can be said to be co-owners and in joint possession of each and every one of the properties of the family, once a partition has taken place and the properties are divided and each one of the members takes possession of the particular items of the properties allotted to him, it can be said that he is taking possession of those properties for the first time, because the former possession was only judicial and constructive, while the later possession becomes physical and exclusive. Apart from this, there is the decision of the Supreme Court itself holding that the character of possession can change into adverse under an invalid document in the hands of a person who is already in possession. In *Padma Vithoba Chakkayya* v. *Mohammed Multani*[2], the Supreme Court pointed out:

"Now the contention of Mr. Ranganathan Chetty, for the respondent is

1. 1958 S.C.J. 438 ; A.I.R. 1958 S.C. 199.

1. (1947) 1 M.L.J. 90 : I.L.R. (1947) Mad. 694.

2. (1963) 2 S.C.J. 172 : (1963) 3 S.C.R. 229: A.I.R. 1963 S.C. 70.

that he had been in possession of the properties as owner ever since 1923, when the second defendant sold them to him, that he had thereby acquired a prescriptive title to them and that the right of the appellant to redeem was thereby extinguished. It is not disputed that, when a person gets into possession of properties, as mortgagee, he cannot by any unilateral act or declaration of her prescribe for a title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But what is contended is that, if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter, not as a mortgagee, but as owner, that would be sufficient to start adverse possession against the mortgagor, if the transaction is for any reason inoperative, under the law. This contention in our opinion is well-founded."

21. It is significant to note that it is this decision of the Supreme Court which has been relied on by the Editors of Mulla's commentaries on the Registration Act in the extract given already. Apart from this the decision of the Privy Council in *Varada Pillai* v. *Jeevarathaammal*[1] does not lend support to any such argument. The extract from the judgment we have given already clearly shows that the document can be looked into for the purpose of finding out the character in which the person has received rents and enjoyed the properties, namely, as that of donee and owner of the land. Therefore, we are of the opinion that the decisions above referred to clearly show that, even though an unregistered deed of partition, as in the present case, is not admissible in evidence for proving the terms of the partition as well as the items of the properties that were allotted to the appellant on the one hand and his deceased elder brother on the other, certainly it can be used as evidence for the purpose of showing the character in which the decesased Nallaswami Goundan was in possession of the properties allotted to his share subsequent to Exhibit B-1. The evidence in this case clearly and indisputably establishes that Nallaswami Goundan was in possession of the properties in his own right and dealt with the same as his own.

22. In view of the overwhelming evidence in this behalf, it is not necessary to refer to the details, and the learned Counsel for the appellant did not contest the position that, once it was held that Exhibit B-1 could be looked into for finding out the character of the possession, the evidence clearly established the adverse possession of Nallaswami Goundan in respect of the properties allotted to his share. Therefore, we hold that Exhibit B-1 is admissible for the collateral purpose, namely, to determine the nature and character of the possession and that the other materials on record could also be taken into consideration for the purpose of coming to a decision that the possession of the properties in question by Nallaswami Goundan was referable to a division of the properties between the parties concerned, and accordingly Nallaswami Goundan and the first defendant had perfected title to the properties by adverse possession.

23. Independent of the above consideration on the basis of the proviso to section 49 of the Registration Act, there is a shorter answer to the claim of the appellant herein. At the time of the death of Nallaswami Goundan in 1932, the first defendant was a minor. The appellant himself filed O.P. No. 14 of 1932 on the file of the District Court, Coimbatore, for appointing a guardian for the first defendant. Exhibit B-5 is a certified copy of the petition filed by the appellant. In paragraph 4 of this petition the appellant stated:

> "The minor is unmarried and is absolutely entitled to the movable and immovable properties set out in the schedule below, which are approximately of the value of Rs. 17,150-0-0. The immovables have fallen to the share of the minor's father, as per partition agreement, dated 24th November, 1924 between minor's father and the petitioner."

Thus it will be seen that the appellant himself had acknowledged the exclusive and absolute title of the first defendant to the items of properties which had been allotted to the deceased Nallaswami

1. (1920) 38 M.L.J. 313 : I.L.R. 43 Mad. 244.

Goundan under Exhibit B-1. Once the appellant himself has admitted the exclusive title of the first defendant to the properties as early as in 1932, certainly it can be held that the first defendant has perfected title to the property in question by adverse possession. Therefore, looked at from any point of view, we are clearly of the opinion that the appellant is not entitled to a fresh partition of the properties which originally belonged to the appellant and his deceased elder brother, Nallasami Goundan.

24. Item 2 of the suit property is one of the items dealt with under Exhibit B-1. Once we come to the conclusion that Nallaswami Goundan during his lifetime and thereafter the first defendant had perfected title to all the items of properties allotted to the share of Nallawami Goundan by adverse possession, certainly the second item of the suit property would also stand on the same footing and with reference to that item also the appellant would have no title. Independently of this, the trial Court has considered the claim of adverse possession put forward by the second defendant to the second item and held that the second defendant has perfected title to the said item of the suit property by adverse possession. We are clearly of the opinion that this conclusion is also correct. Survey No. 122/B measuring 2.34 acres originally belonged to Kavundappa Goundan and Chennimalai Goundan. Under Exhibit B-8, dated 9th August, 1924 Chennimalai Goundan sold his half share to the appellant and the deceased Nallaswami Goundan. This portion is shown as the northern half of survey No. 122/B in Exhibit B-1 and was allotted to Nallaswami Goundan. Nallaswami Goundan and Kavundappa Goundan thereafter sold the entire survey No. 122/B under Exhibit B-9 to one Nachimuthu Goundan. The appellant has attested this sale deed. Under Exhibit B-10, dated 19th January, 1934 Nachimuthu Goundan sold the property to Chennimalai. Chennimalai Goundan in his turn sold the property under Exhibit B-11, dated 14th July, 1937 to the second defendant in the suit. Exhibit B-58, is patta No. 876 relating to the said item. There is clear evidence to show that from 1938 to 1962 it was the second defendant who had been paying kist in respect of this item under Exhibits B-59 to B-66. Consequently, independent of the conclusion that Nallaswami Goundan, and after his death the first defendant, had acquired title by adverse possession to all the items of the properties allotted to the share of Nallaswami Goundan under Exhibit B-1, there is evidence to show that the second defendant and his predecessors-in-interest had acquired title to the second item of the suit properties by adverse possession.

25. Under these circumstances, no ground whatever has been made out for interference with the decree passed by the trial Court. Accordingly the appeal fails and is dismissed with costs (two sets).

S.J. ——— *Appeal dimissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*P. S. Kailasam and N. S. Ramaswami, JJ.*

T. M. Laksminarayana Ayyar and others .. *Appellants**

v.

Nallachi Ammal and others .. *Respondents.*

Madras Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 56 (1) (c) and 64 (c)—Bar of jurisdiction of civil Courts—Effect of repeal of the section by amending Act (XXXIV of 1958)—Grant of patta under section 11—No machinery provided to decide rival claims for patta—Patta only a piece of evidence of title.

Jurisdiction of the Civil Court to decide whether a ryot is entitled to patta or not is not ousted by reason of section 56 (1) (c) of the Madras Estates Land (Abolition and Conversion into Ryotwari) Act. *Arunachala Chettiar* v. *Narayana Chettiar*, (1957) 70 L.W. 291 : (1957) 2 M.L.J. 183; *Chidambara Chettiar* v. *Muhammad Aliar*, (1957) 70 L.W. 489 and *Pachaiammal* v. *Anguswami Gramani*, (1958) 71 L.W. 635 : (1958) 2 M.L.J. 439, held to be not good law.

* L.P. Appeal No. 5 of 1968. *19th July, 1973.*

Even assuming that section 56 can be linked to section 11 regarding the grant of patta to ryotwari lands, still the decision of the Settlement Officer can be only for the purposes of the Act and it would not debar a civil Court from deciding a question of title and possession. [*Para.* 12.]

The provisions of section 56 (1) (*c*) have nothing to do with the grant of patta under section 11. Under section 11, there is no machinery to decide rival claims for patta and the grant of patta to one and refusal to another under the section is not final regarding the question as to who among the rival claimants is entitled to patta and even otherwise a suit for title and the relief of possession or injunction would not be barred. The patta can be used only as one piece of evidence in establishing title. [*Para.* 16.]

The observation that section 56 (1) (*c*) of the Act relates to disputes regarding right to obtain ryotwari patta in *Adaikalathammal* v. *Chinnayan Panipunder*, (1959) 1 M.L.J. 314 : 72 L.W. 358 is only obiter. [*Para.* 10.]

Obtaining ryotwari patta by persons entitled to patta under the Act can, if at all, be only in recognition of pre-existing rights of ownership. *State of Madras* v. *A. Y. S. Parisutha Nadar*,(1961) 2 M.L.J. 285 and *Ramamurthi* v. *State of Madras*, I.L.R. (1970) 2 Mad. 788, followed.

Cases referred to :—

Arunachala Chettiar v. *Narayanan Chettiar*, (1957) 70 L.W. 291 : (1957) 2 M.L.J. 183 ; *Chidambaram Chettiar* v. *Muhammad Aliar*, (1957) 70 L.W. 489; *Pachiammal* v. *Anguswami Gramani*, (1958) 71 L.W. 635: (1958) 2 M.L.J. 439; *Adaikalathammal* v. *Chinnayan Panipundar*, (1959) 1 M.L.J. 314 : 72 L.W. 358; *State of Madras* v. *Parisutha Nadar*, (1961) 2 M.L.J. 285; *Ramamoorthy* v. *State of Madras*, I.L.R. (1970) 2 Mad 788; *State of Madras* v. *Ramalingaswamigal Madam*, (1969) 2 M.L.J. 281; *Arumugham Chettiar* v. *Subramanian Chettiar*, (1970) 83 L.W. 580.

Appeal under Clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Alagiriswami dated 21st April, 1967 and passed in S.A. No. 607 of 1963. (A.S. No. 204 of 1962, Sub-Court, Vellore, against O.S. No. 202 of 1961 District Munsif Court, Tirupathur North Arcot).

A. Sundaram Ayyar, for Appellants.

A. R. Ramachandran, for Respondents.

The Judgment of the Court was delivered by

N. S. Ramaswami, J.—This Letters Patent Appeal is against the judgment of Alagiriswami, J. in Second Appeal No. 607 of 1963. Defendants 1, 2 and 5 are the appellants before the learned Judge as well as before us. The only question that falls for determination in this Letters Patent Appeal is whether the civil Court cannot go into the question of title in respect of the suit land in view of the fact that the land being part of an erstwhile estate, the Settlement Officer had decided the question as to who among the rival claimants was entitled to patta for the said land, under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), hereinafter referred to as the Act.

2. The plaintiffs in the suit are the legal representatives of one Karian. The suit is one for declaration of title and for an injunction restraining the defendants from interfering with the plaintiffs' possession of the same. According to the plaintiffs, the suit land which, as already said, was part of an estate (Thathavalli Estate which has since been taken over under the Act) was ryoti land, that Karian owned the land and that the plaintiffs succeeded to his estate. The family of the first defendant was formerly the land-holder of the said estate. However, the estate is said to have been sold in Court auction prior to the coming into force of the Act and a third party had purchased the estate. After the abolition of the estate under the Act, the plaintiffs as well as the first defendant claimed patta for the suit land under section 11 of the Act. The Assistant Settlement Officer issued patta to the first defendant and it was confirmed by the Settlement Officer. The plaintiffs' claim for patta has not been granted.

3. In the present suit, the Courts below have concurrently held that the plaintiffs have title to the suit property. The trial Court, however, held that the plaintiffs were not entitled to injunction on the

ground that on the date of suit they were not in possession. The first appellate Court decided that the plaintiffs were in possession and, therefore, by virtue of their title to the property, they were entitled to the relief of injunction also. The suit was decreed as prayed for. Alagiriswami J., who heard the second appeal has concurred with the finding of the first appellate Court regarding the question of title and possession and that is no longer in dispute.

4. However, Mr. A. Sundaram Iyer, the learned Counsel for the appellants (defendants 1, 2 and 5) raises the contention, which had been raised before the learned Judge who heard the second appeal and rejected by him, that by virtue of section 56 of the Act, the decision of the Assistant Settlement Officer confirmed by the Settlement Officer that the first defendant was entitled to issuance of patta to him would debar the plaintiffs from maintaining the present suit in the civil Court. According to the learned Counsel, section 56 (1) (*c*) should be read with section 11 of the Act under which ryotwari patta is to be granted and once the settlement authorities grant a ryotwari patta to one of the rival claimants, that decision is final and the defeated claimants cannot go to the civil Court as in the present case. Section 56 which has since been omitted from the Act by Madras Act XXXIV 1958 ran as follows:

> "56 (1) Where after an estate is notified a dispute arises as to (*a*) whether any rent due from a ryot for any fasli year is in arrears or (*b*) what amount of rent is in arrears or (*c*) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer;
>
> (2) Any person deeming himself aggrieved by any decision of the Settlement Officer under sub-section (1) may, within two months from the date of the decision or such further time as the Tribunal may in its discretion allow, appeal to the Tribunal; and its decision shall be final and not be liable to be questioned in any Court of law."

5. According to the learned Counsel, the decision of the Assistant Settlement Officer confirmed by the Settlement Officer granting ryotwari patta to the first defendant is one made under section 56 (1) (*c*) of the Act and that decision has become final under sub-section (2) of section 56, and therefore, not liable to be questioned in the civil Court. The learned Counsel contends that the fact the section, namely section 56, has been repealed by Act XXXIV of 1958 is of no avail to the plaintiffs inasmuch as the decision of the Assistant Settlement Officer and the Settlement Officer was prior to such repeal of the said section. In this connection the learned Counsel referred to section 6 (*b*) of the General Clauses Act which says that the repeal of any enactment, unless a different intention appears, shall not affect the previous operation of any enactment so repealed or anything duly done or suffered there under.

6. The learned Counsel referred to three decisions of this Court, two by Rajagopala Ayyangar, J. and one by Ramaswami, J. in support of his contention. In *Arunachala Chettiar* v. *Narayanan Chettiar*[1], and *Chidambaram Chettiar* v. *Muhammad Aliar*[2], Rajagopala Ayyangar, J., has proceeded on the footing that the question as to who was entitled to the grant of a ryotwari patta is one falling under section 56 (1) (*c*) of the Act and the claim has to be tried by the Settlement Officer under that provision. In *Pachaiammal* v. *Anguswami Gramani*[3], Ramaswami, J. has held that a suit filed after the coming into force of the Act which was in substance and in effect one based on the grant of title in respect of occupancy rights and issue of patta by the Zamindar for the land and the adjudication asked for was in essence nothing more than the determination as to who is the lawful owner with regard to the land, is not maintainable in the civil Court by reason of section 56 (1) (*c*) of the Abolition Act. The learned Judge has proceeded on the footing that the question as to who was entitled to ryotwari patta under section 11 of the Act is one falling under section 56 (1) (*c*) of the Act. In that case the suit was for a declaration of title and for an injunction in respect of the lands in dis-

1. (1957) 70 L.W. 291 : (1957) 2 M.L.J. 183.
2. (1957) 70 L.W. 489.
3. (1958) 71 L.W. 635 : (1958) 2 M.L.J. 439.

pute and the learned Judge construed the suit as one in substance and in effect only for the determination as to who is the lawful ryot, and that the mere addition of certain prayers which could be granted only by the civil Court would not oust the jurisdiction of the special tribunal, namely the Settlement Officer.

7. These decisions, no doubt help the learned Counsel to a great extent, but we are clearly of the view that on a proper construction of the provisions of the Act and also by virtue of the number of decisions rendered by this Court subsequently, the view expressed in the above said three cases cannot be held to be good law.

8. On a proper construction of the provisions of the Act it is clear to us that section 56 (1) (c) is not to be linked with section 11 of the Act. It is under section 11, provision is made for grant of ryotwari patta to a ryot. Under sections 12 to 15, there is provision for the grant of ryotwari patta to the erstwhile landholder. Section 15 of the Act says that the Settlement Officer shall examine the claim of the landholder for a ryotwari patta under sections 12, 13 or 14 as the case may be and decide in respect of which land the claim should be allowed. There is provision in this section for an appeal to the Tribunal and the section says that the decision of the Tribunal on any such appeal shall be final and not liable to be questioned in any Court of law. A provision similar to section 15 which deals with claims under sections 12, 13 and 14 of the Act is not found as far as section 11 of the Act is concerned. Sections 11 to 17 are under the heading "Grant of Ryotwari Pattas". While the Legislature has enacted section 15 providing that the decision of the Tribunal regarding claims under sections 12, 13 and 14 by the land-holder is final and not liable to be questioned in any Court of law, it has not made a similar provision in respect of claims by ryots for ryotwari patta under section 11.

9. Now, turning to section 56, we have to first note the heading under which that section appears. It is under the heading "Miscellaneous". The first section under this heading is section 55 which provides for the collection of arrears of rent which accrued before the notified date. Section 55-A which was introduced in the year 1956 is regarding the apportionment of amount collected under section 55. Section 56 itself, as already noticed, speaks of the Settlement Officer deciding whether any rent due from a ryot for any fasli year is in arrear or what amount of rent is in arrears under clauses (*a*) and (*b*) of sub-section (1) thereof. It is after the abovesaid two clauses, clause (*c*) in that sub-section which relates to the question who the lawful ryot in respect of any holding is, occurs. The context in which this provision occurs makes it clear that the question, who the lawful ryot in respect of any holding is, is related to the question of arrears of rent. This has nothing to do with the question as to who among the lawful claimants was entitled to a ryotwari patta under section 11 of the Act. If the intention of the Legislature is that the decision of the Settlement Officer regarding the question as to who was entitled to a ryotwari patta under section 11 is final and the same cannot be questioned in any Court of law, it would have stated so under the heading "Grant of Ryotwari Pattas", as has been done in section 15 relating to the claims under sections 12, 13 and 14. That the Legislature did not intend section 56 (1) (*c*) to relate to section 11 of the Act is clear from the objects and reasons stated while deleting section 56. The statement of objects and reasons to the Bill published at page 461 of the *Fort Saint George Gazette*, dated 25th September, 1958 in Part IV-A says:

> "Section 55 of the Abolition Act deals with collection of arrears of rent due to the landholder and section 56 was clearly intended to deal only with disputes relating to such arrears of rent; and if so what the amount is and from whom it is due as the lawful ryot in respect of the holding. One of the Estates Abolition Tribunals has however taken the view that section 11 is not self-contained in regard to grant of ryotwari pattas in respect of ryoti lands and that, if there is a dispute as to who among two or more claimants is entitled to ryotwari patta for a particular ryoti land, the Assistant Settlement Officer should deal with the case under section 56 (1) (*c*) and that against

the order of the Assistant Settlement Officer there is an appeal to the Tribunal. Section 11 was intended to be a self-contained provision in regard to grant of ryotwari pattas in respect of ryoti lands in the occupation of ryots and the Tribunal's view will imply that there is some overlapping between sections 11 and 56. Orders passed by the Tribunal in pursuance of its view have led to unnecessary litigation under section 56 and consequential delays.... Hence section 56 is proposed to be omitted."

Under these circumstances, we think it is incorrect to link section 56 (1) (*c*) with section 11.

10. Alagiriswami, J., who heard the second appeal is right when he says that the observation of the Division Bench in *Adaikalathammal* v. *Chinnayan Panipundar*[1] that section 56 (1) (*c*) of the Act relates to disputes regarding right to obtain a ryotwari patta is only obiter and that the learned Judge is not bound by the same. In that case, the Division Bench, as a matter of fact, held that the jurisdiction of the civil Court to entertain a suit for possession in which the question arose as to who was entitled to ryotwari patta was not ousted. The question whether section 56 (1) (*c*) of the Act is linked with section 11 of the Act did not specifically fall for consideration in that case and as a matter of fact it has not been considered.

11. If section 56 (1) (*c*) is not to be linked with section 11 of the Act, then the basis of the contentions of Mr. Sundaram Iyer, learned Counsel for the appellants, fails. The contention has been that as the Settlement Officer has already decided the question as to who was entitled to ryotwari patta and that decision has become final by virtue of section 56 of the Act, the parties are bound by the same and it is not open to the civil Court to go into that question afresh. From the foregoing discussions it will be clear that the grant of patta by the Settlement Officer to the first defendant is not an order coming under section 56 (1) (*c*) and thereby the order becoming final under sub-section (2) of that section.

12. Even assuming that section 56 can be linked to section 11 regarding the grant of patta to ryotwari lands, still we are of opinion that the decision of the settlement Officer can be only for the purpose of the Act and that it would not debar a civil Court from deciding title and possession.

Assuming that the grant of patta by the Settlement Officer under section 11 to one of the claimants and refusal to grant such patta to another amounts to a final decision as to who was entitled to a ryotwari patta and the same is not liable to be questioned in any Court of law, it would not mean that the person to whom the ryotwari patta has been issued alone has title to the land and the same cannot be challenged. The question of title has necessarily to be gone into by the civil Court and certainly is not a matter within the jurisdiction of the Settlement authorities. Mr. Sundaram Iyer contends that when the estate was taken over under the Abolition Act, all lands vested in the Government, which means, title to all the lands was with the Government and that when the Settlement authorities issued ryotwari pata to a particular claimant negativing the claim of the others the defeated parties cannot be heard to say that they have title to the lands. This is too broad a proposition which we cannot accede to: In *State of Madras* v. *Parisutha Nadar*[1], a Division Bench of this Court to which one of us was a party, at page 290 has observed:

> "The terms of the *proviso* to section 3 (*d*) of the Act are clear and mandatory. Any person in possession of any land in the estate claiming to be a ryot or a landholder shall not be dispossessed if it were to be found that such a person is *prima facie* entitled to a ryotwari patta under the Act. Sections 11 to 14 are equally mandatory enabling the ryot or the landholder to claim ryotwari patta in accordance with the terms of the said sections. The immunity from dispossession as vouchsafed under the proviso to section 3 (*d*) in favour of persons in possession of parcels of land in the estate is part and parcel of the vesting of the entire estate in favour of the State Government, and it cannot be said that to the extent to which this right of

1. (1959) 1 M.L.J. 314 : 72 L.W. 358.

1. (1961) 2 M.L.J. 285.

immunity has to be recognised the operation of the vesting itself has to be limited. The Act does not create new rights of ownership and the grant of ryotwari patta under the Act is not a conferment of rights by way of grant or conveyance. The obtaining of ryotwari patta by the persons entitled to such patta under the Act, can if at all be only in recognition of pre-existing rights of ownership. A ryotwari patta granted by the Revenue authorities in respect of lands in a Government village is not a title deed but is only a bill for rent."

In *Ramamoorthy* v. *State of Madras*[1], Natesan, J., in dealing with the effect of section 3 (*d*) of the Act has held, as found in the head-note, as follows:

"In effect both possession and title of person who is entitled to a ryotwari patta are saved from the effect of the notification under section 3 (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act. The interest of the ryot in land in the estate is separate and distinct, he being a co-owner or, as occasionally stated, a co-partner with the landholder. He is not given any compensation, as his ownership of the kudiwaram is not affected by taking over the estate. On the abolition of the estate, his rights of occupancy in the land are not extinguished and transferred to the Government but continued in him. Under the Act, he is entitled to be granted ryotwari patta for his former ryoti holding as the Act makes him a ryotwari proprietor of the holding. Obtaining of ryotwari patta by the persons entitled to the patta under the Act can, if at all, be only in recognition of pre-existing rights of ownership."

We respectfully agree with the above view. The vesting contemplated under section 3 of the Act is not meant to extinguish title to the land. That being the position, even if section 56 (1) (*c*) is linked with section 11 or, in other words, the grant of ryotwari patta under section 11 is an order coming within the mischief of section 56 (1) (*c*) and thereby the order of the Settlement Officer becomes final and not liable to be questioned in a Court of law, we fail to see how it can be rightly contended that the question of title to the land cannot be agitated in the civil Court. Even under the above circumstances, the grant of patta by the Settlement authority to a particular party may at best be only one piece of evidence regarding the question of title to the land. So it cannot be said that once the settlement authorities grant a patta to one of the rival claimants, the jurisdiction of the civil Court to go into the question of title to the land is taken away. This is the position even if we assume that grant or refusal of patta under section 11 is an order under section 56 (1) (*c*) of the Act. But, as we already indicated, section 56 (1) (*c*) has nothing to do with the grant of patta under section 11 and therefore even under the scheme of the Act, the order of the Settlement Officer granting or refusing to grant patta under section 11 is not final and one which cannot be questioned in any Court of law as contemplated under section 56 (2) of the Act.

13. That being so, section 64-C of the Act would not bar the jurisdiction of the civil Court in this case. As a matter of fact, Mr. Sundaram Iyer, learned Counsel for the appellants proceeded on the footing that only if the order of the Settlement Officer in this case comes under section 56 (1) (*c*), the civil Court's jurisdiction would be barred and he never contended that even if section 56 (1) (*c*) is not applicable, the suit is not maintainable by virtue of section 64-C. The learned Counsel is right in taking such a stand because it is well settled that section 64-C cannot be invoked to bar the jurisdiction of the civil Court except in respect of matters to be determined for the purpose of the Act and there is a machinery under the Act. If section 56 (1) (*c*) has no application to the grant of ryotwari patta under section 11 as we hold now, it is clear that the Act has not provided any machinery to determine a dispute between rival claimants for ryotwari patta under section 11. Section 11 itself does not provide such machinery.

14. *State of Madras* v. *Ramalingaswamigal Madam*[1], is a case where the dispute was

1. I.L.R. (1970) 2 Mad. 788.

1. (1969) 2 M.L.J. 281.

whether the lands in question were ryoti lands or communal lands. The plaintiffs, in that case had been agitating for a patta under section 11 of the Act, but the same had been refused by the Settlement authorities on the ground that the lands were communal lands. The plaintiffs filed suits in the civil Court to establish their title. There were two suits of similar nature which came up in second appeal before Natesan, J. The question agitated in these two matters was whether the civil Court had no jurisdiction to entertain the suits inasmuch as the Settlement authorities had held that the suit lands were communal poramboke and that the plaintiffs were not entitled to patta. The two second appeals were ultimately heard by a Division Bench on a reference made by Natesan, J., and the Division Bench held that the finality under section 64-C of the Act is only in respect of matters to be determined for the purpose of the Act, that there is no machinery in the Act to determine whether a land in the estate is ryoti land or communal land, that even in respect of an enquiry for the grant of a ryotwari patta under section 11 read with section 3 (2) of the Act, a decision as to question of title by the statutory authorities is only an incidental matter which would not preclude a civil Court independently enquiring into it in a properly constituted suit and that therefore section 64-C of the Act cannot be held to be a bar to the maintainability of the suit. The learned Judges also pointed out that unlike in sections 12 to 14 of the Act for the grant of ryotwari pata to a landholder in respect of private lands, there is no similar express provision for any enquiry for grant of ryotwari patta to a ryot in respect of ryoti land and that it is only by reading section 11 in the light of the proviso (1) to section 3 (*d*) of the Act that an inference could be made that a Settlement Officer is enabled to grant a ryotwari patta to a ryot. Mr. Sundaram Iyer tries to distinguish this case on the ground that in that case the dispute was not between rival claimants both claiming patta under section 11, but the dispute was between a claimant under section 11 and the State. But this distinction between the two cases has nothing to do with the present question. In both the cases the claim is for a patta under section 11, though in the reported case there was no other person similarly claiming patta. The point to be noted is that regarding a claim for patta under section 11 of the Act, there is no provision for an enquiry making the decision of the settlement authorities final.

15. Even in respect of a ryotwari patta to the landholder, the enquiry contemplated does not cover disputes between two rival claimants and hence such a dispute which relates to title can be entertained by the civil Court and section 15 read with section 64-C of the Act would not oust such jurisdiction. *Arumugham Chettiar* v. *Subramanian Chettiar*[1] is directly to the point. There the suit was for declaration of title and for permanent injunction, and the dispute was between two rival claimants claiming patta under sections 12 to 14 of the Act. As already noticed, section 15 of the Act says that the decision of the Tribunal relating to matters coming under sections 12 to 14 shall be final and not liable to be questioned in any Court of law. Section 64-C of the Act says that any order passed by the Government or other authority under the Act in respect of matters to be determined for the purpose of the Act shall, subject only to any appeal or revision provided by or under the Act, be final. After considering these provisions, Natesan, J., held that the sections do not provide for, and are not intended to give an adjudication as to the ownership of pannai land between rival claimants, that the decisions of the Tribunal to which a finality is given under section 15 (*b*) is with reference to the determination provided for in section 15 (*b*) and that the effective determination under section 15 in respect of claims for patta under sections 12 to 14 is confined to the classification of the category of the land. The learned Judge has further observed that there is no provision in the Act providing for the determination of claims *inter se* between rival landholders to patta in respect of pannai lands.

16. To sum up we hold, that section 56 (1) (*c*) has nothing to do with the grant of patta under section 11, that under section 11 there is no machinery to decide

1. (1970) 83 L.W. 580.

rival claims for patta, that the grant of patta to one and refusal to another under that section is not final regarding the question as to who among the rival claimants is entitled to patta and that even otherwise a suit for title and the relief of possession or injunction would not be barred, for patta can be used only as one piece of evidence in establishing title.

17. From what we have said it is clear that the present suit out of which this Letters Patent Appeal has arisen is not barred either by virtue of any of the provisions contained in the Act or under the principles of *res judicata*.

18. The Letters Patent Appeal fails and it is dismissed with costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. S. Kailasam and N.S. Ramaswami, JJ.*

Sri Venkataramanaswamy Deity at Kothur Village by its Trustee K. R. Sanjivi Chetty .. *Appellant**

v.

Vadugammal .. *Respondent.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 93—*Scheme as to jurisdiction of civil Court—Scope—Relief as to title—Cannot be had before Deputy Commissioner—Suit maintainable in civil Court—Civil Court can also decide in such a suit incidental issues which are within the jurisdiction of Deputy Commissioner.*

The scheme of the Tamil Nadu Hindu Religious and Charitable Endowments Act regarding the jurisdiction of the civil Court is different from that of enactments like the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). Section 93 of the former Act would provide that no suit in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act shall be instituted in any Court except under and in conformity with the provisions of the Act. In fact, in respect of several matters, approach to the civil Court is provided for in the Act itself, as for instance, in sections 31 (4), 31-A, 39 (4), 52, 62 (3) (*a*), 74 (5), 87. Relief as to title cannot be had before the Deputy Commissioner and, at any stage, a suit for declaration of title is maintainable in a civil Court.

[*Para.* 18.]

The aim of the Act is not to exclude the jurisdiction of the civil Court, but to facilitate proper administration of religious institutions by following the procedure prescribed to pursue the remedy before the Deputy Commissioner and the Commissioner before filing the suit. On the other hand, under the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948 and other special enactments, the jurisdiction of the special tribunals under the Acts is confined only for the purposes of the Act.

[*Para.* 19.]

The preponderance of judicial authority in the Madras High Court is that a civil suit is not barred in respect of a relief which cannot be granted by the Deputy Commissioner for Endowments and that in such a suit, the civil Court has jurisdiction to decide incidental issues which are within the jurisdiction of the Deputy Commissioner. [*Para.* 19.]

Cases referred to :—

Appanna v. *Narasinga*, (1922) I.L.R. 45 Mad. 113: 41 M.L.J. 608: A.I.R. 1922 Mad. 17; *Tirumalai Tirupati Devasthanam Committee* v. *Krishnayya Shanbhaga*, I.L.R. (1943) Mad. 619 : (1943) 1 M.L.J. 388 : A.I.R. 1943 Mad. 466; *V.L.N.S. Temple* v. *Pattabhirami*, (1967) 1 S.C.R. 280: A.I.R. 1967 S.C. 781; *Manjeshwer Srimad Anantheswerar Temple* v. *Vaikunta Bhakta*, (1942) 2 M.L.J. 757; A.I.R. 1943 Mad. 228; *Vaithilinga Pandarasannathi* v. *Temple Committee, Tirunelveli*, (1931) I.L.R. 54 Mad. 1011 : 61 M.L.J. 815 : A.I.R. 1931 Mad. 801 ; *Sri Sarveshwaraswami Vari Temple* v. *Veerabhadrayya*, (1961) 1 An.W.R. 250; *Avisomma* v. *Kunhali*, (1957) 1 M.L.J 5: A.I.R. 1957 Mad. 674; *Pachamuthu Nadar* v. *T.P. Temple Charity*, (1970) 83 L.W. 768: A.I.R. 1971 Mad. 253; *Thirumalaiswami* v. *Villagers of Kadambur*, I.L.R. (1968) 3 Mad. 638: 81 L.W. 342: A.I.R. 1969 Mad. 108; *Viswanath* v. *Radha Balubhi*, (1967) 2 S.C.J. 331: (1967)

*L.P.A. No. 56 of 1968. 26*th July*, 1973.

2 S.C.R. 618: A.I.R. 1967 S.C. 1044; *State of Madras* v. *Kunnakudi Melamatam*, (1966) 2 M.L.J. 13; *Thiruvengada Varadachariar* v. *Srinivasa Iyengar*, (1973) 1 M.L.J. 266.

Appeal under Clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Srinivasan, dated 26th October, 1967 and passed in S.A. No. 935 of 1963 preferred against the decree of the Court of the Subordinate Judge, Salem, in A.S. No. 6 of 1962 (O.S. No. 373 of 1959 Court of the District Munsif, Krishnagiri).

R. Sundaralingam, for Appellant.

K. Parasaran, W.C. Thiruvengadam, for Respondent.

The Judgment of the Court was delivered by

Kailasam, J.—The plaintiff Sri Venkataramanaswami Deity at Kothur by Trustee K.R. Sanjeevi Chetty is the appellant in this Letters Patent Appeal. The plaintiff filed a suit for a declaration of the plaintiff's title to the suit properties, for possession and for past and future mesne profits. According to the plaint, the suit properties originally belonged to one Nanjachari who dedicated them to the Deity and after Nanjachari's death, the villagers were managing the properties. Subsequently, N.R. Sanjeevi Chetty was appointed trustee by the Hindu Religious and Charitable Endowments Board. As the original deed of dedication was destroyed, the heirs of the grantor confirmed the factum of dedication by a registered deed in February, 1958. It was stated that the defendant got possession of the properties with the permission of the villagers on promise to pay rent, but she failed to pay rent and started asserting her own title to the suit properties. The suit was opposed by the defendant on the ground that the suit properties which belonged to Nanjachari and his sons, fell to the share of Krishnamachari son of Nanjachari at a family partition, and Krishnamachari's son Ramalingachari sold the properties to the defendant in the year 1949. It was also contended by the defendant that she was in possession of the suit properties in her own right and has perfected title by adverse possession. The dedication to the temple and the documents relied on by the plaintiff were disputed. The defendant also raised the ground that the civil Court is barred from trying the suit by virtue of the provisions contained in the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1951 (Tamil Nadu Act XIX of 1951) (hereinafter referred to as the Act). The Courts below and the learned Judge who heard the Second Appeal took the view that the suit is barred because of the provisions of sections 57 and 93 of the Act and dismissed the suit.

2. The question that arises for consideration in this appeal is whether the suit which is for a declaration of the plaintiff's title to the suit properties, for possession and for past and future mesne profits is barred because of the provisions contained in the Act. The relevant provisions in the Act may be referred to. Section 57 of the Act runs as follows:—

"*Section* 57.—Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters:—

(*a*) whether an institution is a religious endowment;

(*b*) whether a trustee holds or held office as a hereditary trustee;

(*c*) whether any property or money is a religious endowment;

(*d*) whether any property or money is a specific endowment;

(*e*) whether any person is entitled, by custom or otherwise, to any honour, emolument or perquisites in any religious institution and what the established usage of a religious institution is in regard to any other matter;

(*f*) whether any institution or endowment is wholly or partly of a religious or secular character; and whether any property or money has been given wholly or partly for religious or secular uses; and

(*g*) whether any property or money has been given for the support of an institution which is partly of a religious and partly of a secular character, or for the performance of any service or charity connected with such an institu-

> tion or the performance of a charity which is partly of a religious and partly of a secular character or where any property or money given is appropriated partly to religious and partly to secular uses, as to what portion of such property or money shall be allocated to religious uses."

Section 61 provides that any party aggrieved by any order passed by the Deputy Commissioner under any of the provisions of Chapter V of the Act may appeal to the Commissioner. Section 62 provides that a party aggrieved by the order passed relating to any of the matters specified in section 57 may institute a suit in the Court against such an order. Section 62 (2) provides that any party aggrieved by a decree of the Court under sub-section (1) may appeal to the High Court; Section 93 runs as follows:

> "*Section* 93.—No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act, shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act."

Thus, the filing of a suit in a civil Court in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act is barred, except under and in conformity with the provisions of the Act. Though the jurisdiction of the civil Court to decide matters that arise under section 57 of the Act is not totally prohibited, the section requires that the procedure that is prescribed under the Act should be followed. Thus, the procedure laid down in sections 57, 61 and 62 should be followed before resort is had to the civil Court. It is beyond dispute that matters which strictly fell within the scope of section 57 will have to be taken to the Deputy Commissioner and the procedure prescribed in the Act followed. So far as matters do not relate to the subjects enumerated in section 57, a civil suit will lie. But in a case in which certain reliefs asked for cannot be granted under section 57, but certain other reliefs could be secured, the question arises as to whether all the reliefs could be obtained by going to a civil Court. There is ample authority for the proposition that the civil Court can decide the suit particularly when the substantial relief is one that cannot be granted by the Deputy Commissioner even though questions that arise incidentally may be within the jurisdiction of the Deputy Commissioner under section 57 of the Act.

3. The general rule is that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The Explanation to section 9 Code of Civil Procedure says that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. Section 93 of the Act does not prohibit the jurisdiction of the civil Court in respect of all matters that are within the cognizance of the Deputy Commissioner or the Commissioner. What is said is that a suit coming within the scope of section 93 can be instituted only in accordance with the provisions of the Act. The matters that fall within the scope of section 93 are (1) suits in respect of the administration or management of a religious institution and (2) any other matter or dispute for determining or deciding which provision is made in the Act. The clause for "determining or deciding which provision is made in this Act" qualifies the words "other matter or dispute." The words "administration or management" cannot be construed too widely.

Section 92 (2) Code of Civil Procedure runs as follows:—

> "Save as provided by the Religious Endowments Act, 1863, or by any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

Construing the said sub-section, a Full Bench of this Court in *Appanna* v. *Nara*-

singa[1], held that a suit by a trustee of a public religious trust against a co-trustee, for accounts did not fall within the section though the relief claimed was the one specified in sub-section (1), clause (*d*). The reason given was that the relief was sought not in the larger interest of the public but merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which, were imposed upon him by the trust. Another Full Bench of this Court in *Tirumalai Tirupati Devasthanam Committee* v. *Krishnayya Shanbhaga*[2], held that the said section did not apply where the general trustees of a public temple sued the trustees of certain offerings given to the deity for accounts, on the ground that in that suit the right of the public was not sought to be enforced but only the personal rights of the trustees *qua* the trustees.

4. The expression "except under, and in conformity with, the provisions of this Act" has been construed by the Supreme Court in *V.L. N. S. Temple* v. *I. Pattabhirami*[3], as meaning that section 93 will apply only to matters for which provision has been made in the Act. It does not bar suits under the general law which did not fall within the scope of any of the sections of the Act. In coming to the conclusion stated above, the Supreme Court cited with approval the decisions of this Court in *Manjeshwar Srimad Anantheswar Temple* v. *Vaikunta Bhakta*[4], and *Vaithilinga Pandarasannadhi* v. *Temple Committee, Tirunelvelly*[5]. In the latter decision, the suit was filed to establish the right of a hereditary trusteeship of a certain temple. The Court held that the words "except as provided by this Act" in section 73 of Madras Act II of 1927 as amended by Act I of 1928 mean "contrary to the provisions of this Act." The Court held that the Act provided for the institution of suits, or for reference to a Court in a number of circumstances, for instance, sections 55 (4), 57, 63, 65, 67 and 73 of the Act. The Court held that the first part of section 73 (1) is modelled very closely upon section 92 of the Code of Civil Procedure, some of the reliefs which may be sued for under the terms of section 92 being reproduced verbatim, while others are provided for elsewhere in the Act. The Court concluded that it is not possible to contend successfully that a class of suit to which section 92 would not relate can be brought within the scope of the first part of section 73. Referring to the suit by a trustee to establish his hereditary right to his office, the Court held that it was doubtful whether the suit was in respect of the administration or management of the religious endowment to which the trusteeship appertains. It is a suit relating to a personal right, and, though upon its decision may depend the question whether or not the plaintiff continues in office as trustee, that question is not one arising out of the administration of the trust, as for instance where a trustee is removed for breach of trust or mismanagement. Horwill, J. in *Nanjeshwar Srimad Anantheswar Temple* v. *Vaikunta Bhakta*[1], after referring to the decision in *Vythilinga Pandarasannadhi* v. *Temple Committee, Tirunelvelly*[2], and other cases summed up the position which is extracted by the Supreme Court in *V. L. N. S. Temple* v. *I. Pattabhirami*[3], thus:

> "It will be seen therefore that from *Vythilinga Pandarasannadhi* v. *Temple Committee, Tirunelvelly*[2], onwards there was a considerable body of opinion that the general scope of section 73, Hindu Religious Endowments Act, is the same as section 92, Civil Procedure Code that the last paragraph of section 73 of the Act is meant to refer only to the classes of cases referred to in section 73 (1) and other sections of the Act, and that suits which do not fall within the scope of these sections can be tried under the general law. I have not come across any case in which these opinions were dissented from or contrary opinion expressed".

1. 41 M.L.J. 608 : (1922) I.L.R. 45 Mad. 113 : A.I.R. 1922 Mad. 17.
2. I.L.R. (1943) Mad. 619 : (1943) 1 M.L.J. 388 : A.I.R. 1943 Mad. 466.
3. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.
4. (1942) 2 M.L.J. 757 : A.I.R. 1943 Mad. 228.
5. (1931) I.L.R. 54 Mad. 1011 : A.I.R. 1931 Mad. 801 : 61 M.L.J. 815.

1. (1942) 2 M.L.J. 757: A.I.R. 1943 Mad. 228.
2. (1931) I.L.R. 54 Mad. 1011: 61 M.L.J. 815: A.I.R. 1931 Mad. 801.
3. (1967) 1 S.C.R. 280; A.I.R. 1967 S.C. 781.

The Supreme Court also approved of the decision of the Andhra Pradesh High Court in *Sri Sarveshwaraswami Vari Temple* v. *Veerabhadrayya*[1], wherein the trustees sued for the recovery of the temple properties from the hereditary archakas. The Andhra Pradesh High Court held that the suit was not one in respect of the administration or management of the temple and therefore it did not attract the embarge under section 73.

5. In *Avisomma* v. *Kunhali*[2], a Bench of this Court held that a civil Court had jurisdiction to decide whether a particular institution is a public temple or not when such a question arises incidental to other disputes before the Court. The Bench approved of the views of Rajamannar, C.J. in *Choolat Puthiapurayil Kunhali and 4 others* v. *Thayoth Puthapurayil Ayisooma and 3 others.*[3]

6. In *Agasthiappa Mudaliar* v. *Manicka Gounder and 3 others*[4], a Bench of this Court was dealing with a suit laid in a representative capacity for recovery of possession of the suit lands. According to the plaint, Sri Ekambaranathaswamy temple at Sethupattu village was a village temple constructed by the villagers out of collections made by them and they had allowed the second defendant, who was one among the villagers, to supervise the construction on their behalf and maintain accounts and while so, the second defendant arrogating to himself the position of a hereditary trustee, executed a settlement deed in favour of the first defendant transferring his right to be a trustee of the temple. The Subordinate Judge upheld the claim of the plaintiffs that the temple belonged to the villagers and that the villagers were in the position of the trustees for the same. The Subordinate Judge also negatived the claim of the second defendant that he had a hereditary right to trusteeship. A decree was granted declaring that the transfer of trusteeship in favour of the first defendant was invalid as the former had no title to the office, and directing delivery of possession of the temple and its properties. In the Second Appeal Ramachandra Iyer, C.J. observed that there can be no doubt that if the only matter in dispute is whether a particular party is a hereditary trustee or a property a religious endowment or not, such a dispute can be decided only in accordance with the Act by the Deputy Commissioner in the first instance. Answering the question posed on itself whether it can be said that in the instant case the sole point for decision is whether the second defendant was a hereditary trustee or not, the Court observed that the dispute was about the title to the temple and its properties, that the suit was one for possession and the substantial issue was whether the contesting defendant's possession was lawful. The Court further observed that for a consideration of that issue, it mattered little whether the second defendant was a hereditary trustee or only an ordinary trustee and the suit being one in ejectment, the plaintiffs, could succeed only if they proved that they had a superior title to the property, *viz.*, that they are the trustees of the temple and that they are entitled to possession of the temple and its properties. Therefore it was found that the question for determination is not whether the defendant has got a hereditary right or not, but whether the plaintiffs had a superior right, and it may be that while considering the matter, the further question about the second defendant being a hereditary trustee might incidentally arise. But a question which arises incidentally cannot oust the jurisdiction of the civil Court to decide the suit, particularly when the substantive relief of declaration of title and possession can be only granted by that Court. It may be seen that this decision was one on the basis that the substantive relief or declaration of title and possession can be granted only by the civil Court and if any question as to whether the defendant was a hereditary trustee or not arose, it was only incidental and the civil Court is not barred from going into it. It may be noted that the Bench did not refer to the decision in *Vythilinga Pandarasannadhi* v. *Temple Committee, Tirunelvelly*[1], which was approved by the Supreme Court in *V. L. N. S. Temple* v. *I. Pattabhirami*[2], wherein it was held on a

1. (1961) 1 Andh.W.R. 250.
2. (1957) 1 M.L.J. 5 : A.I.R. 1957 Mad. 674.
3. S.A. No. 1396 of 1948.
4. S.A. No. 117 of 1959.

1. (1931) I.L.R. 54 Mad. 1011: 61 M.L.J. 815 : A.I.R. 1931 Mad. 801.
2. (1967) 1 S.C.R. 280 ; A.I.R. 1967 S.C. 781;

consideration of the decisions rendere under section 92 o the Code of Civil Procedure that a suit by a trustee to establish his hereditary right to the office was not one in respect of the administration or management of a religious institution to which trusteeship appertains and that it is a suit relating to a personal right.

7. In *Pachamuthu Nadar* v. *T. P. Temple Charity*[1], the question arose as to whether a suit for recovery of possession of the properties belonging to the religious institution represented by an interim trustee appointed by the Commissioner, Hindu Religious and Charitable Endowments Board for the purpose of taking action for the recovery of the plaint charity, is a dispute which cannot be taken cognizance of by the civil Court. The Bench held that the suit as framed was not exclusively for a declaration that the plaint schedule properties were vested in trust. The main relief was recovery of possession of the properties of the trust from the alienee who was a stranger to the trust, and the investigation of the trust character of the properties was only incidental to the main relief of recovery of possession. The decision of the Supreme Court in *V. L. N.S. Temple* v. *I. Pattabhirami*[2], was relied on.

8. In *Thirumalaiswami* v. *Villagers of Kadambur*[3], Natesan, J. dealing with the scope of section 93 of the Act held that section 93 bars only those suits for which provision has been made in the Act and it does not prohibit the institution of suits under the general law which do not fall under the scope of any of the sections of the Act. In *Viswanath* v. *Radha Balabhi*[4], the Supreme Court held that a suit filed by an idol for a declaration of its title and possession of property from a person who is in possession thereof under a void alienation being only in the nature of enforcement of a private right by the idol and not being one of the reliefs found in section 92 of the Code of Civil Procedure, falls outside its purview and is not barred.

1. (1970) 83 L.W. 768 : A.I.R. 1971 Mad. 253.
2. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.
3. I.L.R. (1968) 3 Mad. 638 : 81 L.W. 342 : A.I.R. 1969 Mad. 108.
4. (1967) 2 S.C.J. 331: (1967) 2 S.C.R. 618 : A.I.R. 1967 S.C. 1044.

9. On a consideration of the cases cited, it is clear that the prohibition under section 93 of the Act is strictly confined to the cases that fall under the section, namely, suits in respect of the administration or management of a religious institution, or any other matter or dispute for determining or deciding which provision is made in the Act.

10. The Supreme Court in *V. L. N. S. Temple* v. *I Pattabhirami*[1], has held that section 73 (4) of Tamil Nadu Act II of 1927 like section 92 of the Code of Civil Procedure does not take away the right of a trustee to file a suit for asserting a private right of the trustee. Section 93 of the Act differs from section 73 (4) of Tamil Nadu Act II of 1927 in that it also prohibits filing of suits regarding any other matter or dispute for determining or deciding which provision is made in the Act. Such provision is applicable only to matters in dispute for determining which the Act makes provision.

11. *Vythilinga Pandarasannadhi* v. *Temple Committee, Tirunelvely*[2], related to a suit by the hereditary trustee for a declaration of his right as a hereditary trustee. The question as to whether a person holds or held office as a hereditary trustee can be decided by the Deputy Commissioner under section 57 (*b*) of the Act. Yet, the Bench held that such a suit is not prohibited on the ground that it is in respect of the administration or management of the religious institution to which the trusteeship appertains. If the Court had stopped with that, it might be argued that section 93 of the Act is wider in its scope than section 73 (4) of Act II of 1927. But the Bench also rested its conclusion on the ground that it is a suit relating to the personal right and though upon its decision may depend the question whether or not the plaintiff continues in office as trustee, that question is not one arising out of the administration of the trust. The Court further observed that the section cannot be construed in a manner that would create an absolute bar to any suit for the establishment of personal rights.

1. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.
2. (1931) I.L.R. 54 Mad. 1011 ; 61 M.L.J. 815: A.I.R. 1931 Mad. 801.

12. The Supreme Court in *V. L. N. S. Temple* v. *I. Pattabhirami*[1], was dealing with the effect of sections 57 and 93 of the Act. After referring to the decision in *Vythilinga Pandarasannadhi* v. *Temple Committee, Tirunelveli*[2], the Supreme Court observed that section 93 of the Act enlarges the scope of section 73 (4) of Act II of 1927, and it bars not only suits or legal proceedings in respect of the administration or management of a religious institution, but also in respect of any other matter or dispute for determining or deciding which provision is made in the Act. The Court observed that by repeating the phrase 'except under and in conformity with the provisions of the Act' which had received authoritative judicial interpretation when it remained in section 73 (4) of the earlier Act, the Legislature must be held to have accepted the interpretation put upon the phrase by the Courts. The conclusion the Supreme Court arrived at was that section 93 will apply only to matters for which provision has been made in the Act and it does not bar suits under the general law which do not fall within the scope of any of the sections of the Act.

13. Section 57 of the Act relates to the powers of the Deputy Commissioner to enquire into and decide the disputes and matters referred to in the section and section 58 empowers the Deputy Commissioner to frame a scheme in the interest of the proper administration of the religious institution. In respect of matters that specifically fall under any of the two sections (sections 57 and 58) and any other matter arising in any of the sections in the Act which empowers the Deputy Commissioner to exercise certain powers, the procedure, should be followed before resort is had to the civil Court. The decision of the Supreme Court in *V. L. N. S. Temple* v. *I. Pattabhirami*[3], is an authority for the proposition that section 93 of the Act will apply only to matters for which provision is made in the Act and it does not bar suits under the general law which do not fall within the scope of any sections of the Act. If a relief is asked for which cannot be granted by the Deputy Commissioner, it can only be sought for before the civil Court. The civil Court in deciding the issue which is not within the domain of the Deputy Commissioner can decide incidental issues that may arise even though those issues may fall within the provisions of sections 57 and 58 of the Act. This is the view taken by a Bench of this Court in *Avisomma* v. *Kunhali*.[1] That was a suit filed for redemption of certain properties which originally belonged to a Devaswom. The properties had been demised to a tarwad who had sub-mortgaged the same to one Ayyamad in or about 1923. Ayyamad in 1930 executed a consolidated kanom deed. The Devaswom conveyed the properties in the year 1943 to the plaintiff who instituted the suit. The relief asked for was redemption of the sub-mortgage of the year 1923. The defence was that the plaintiff had no title to redeem, the contention being that the Devaswom was a 'temple' within the meaning of the Act and that the sale of the properties of the temple to the plaintiff by the trustees without the sanction of the Endowments Board was void. In deciding the suit for redemption, the question whether the plaintiff was entitled to redeem was one of the points that had to be decided. The question whether a temple was a public temple or not was incidental in a suit for redemption of the mortgage. Though the question whether the temple was a public temple or not had to be decided by the Deputy Commissioner as the relief, sought was for the redemption of a mortgage, a relief which the Deputy Commissioner could not grant, the issue whether the temple was a public temple or not was considered as incidental to the relief claimed.

14. In Second Appeal No. 117 of 1959 the relief prayed for in the suit was a declaration of the temple's title to the properties and for delivery of possession of the properties. The Court observed that the dispute was one about the title to the temple and its properties and for possession and the substantial issue was whether the contesting defendant's possession was lawful. Though the ques-

1. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.
2. (1931) I.L.R. 54 Mad. 1011: 61 M.L.J. 815: A.I.R. 1931 Mad 801.
3. A.I.R. 1967 S.C. 781 ; (1967) 1 S.C.R. 280.

1. (1957) 1 M.L.J. 5 : A.I.R. 1957 Mad. 674.

tion as to whether the second defendant was a hereditary trustee or not arose in the suit, it was only incidental, and the jurisdiction of the civil Court to decide that issue, though it was within the competence of the Deputy Commissioner, was affirmed. The point that was decided by the Bench was that when the relief asked for is for a declaration of title and for possession which reliefs are not within the competence of the Deputy Commissioner, other issues that may be decided by the Deputy Commissioner even though they may arise before the civil Court, can be considered as incidental issues and the jurisdiction of the civil Court to decide such issues is not barred.

15. In *Pachamuthu Nadar* v. *T. P. Temple Charity*[1], the suit was for recovery of possession of the properties belonging to a religious institution represented by an interim trustee appointed by the Commissioner, Hindu Religious and Charitable Endowments Board. The Court held that the suit was not exclusively for a declaration that the plaint scheduled properties are vested in the trust. The main relief was for recovery of possession fo the properties of the trust from the alienee who was a stranger to the trust. The investigation of the trust character of the properties was only incidental to the main relief of recovery of possession. It was contended before the Bench that the question whether the suit properties are invested with a trust character is one which falls under section 57 (*d*) of the Act, and under section 93 of the Act, the civil Court will have no jurisdiction to entertain a suit of that kind, and that relief for that purpose should be obtained from the several provisions contained in the statute itself. The Court answered that the suit was not exclusively for a declaration that the plaint schedule properties were vested in trust, that the main relief was recovery of possession of the properties of the trust and that the investigation of the trust character of the properties was only incidental to the main relief of recovery of possession from the alienee who was a stranger to the trust.

16. In support of the contention that the civil Court had no jurisdiction, strong reliance was placed on the decision of the Supreme Court in *State of Madras* v. *Kunnakudi Melamatam*[1]. The suit was filed by the head of the institution claiming two different reliefs, namely, (1) an injunction restraining the levy of contribution and audit fees under Act II of 1927 and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951. The Court held that as to one of the disputes in the suit whether the institution is a religious institution within the meaning of Act XIX of 1951, specific provision is made in sections 57, 61 and 62 for determination by the specified authorities and eventually by a suit under section 62. As the suit was not brought under or in conformity with section 62, and consequently, in so far as the suit claimed the relief of injunction restraining the levy of contribution and audit fees under Act XIX of 1951, it was barred by section 93 of the Act. Regarding the other relief, the Court held that the decision of the Board in 1932 under the Act of 1927 was final for the purpose of that Act, but it was not final for purposes of the Act XIX of 1951. The Supreme Court was not considering the question as to how far the civil Court may decide matters which arise incidentally before it though falling within the jurisdiction of the Deputy Commissioner. In this view and in view of the subsequent decision of the Supreme Court in *V.L.N.S. Temple* v. *I. Pattabhirami*[2] this decision cannot help the respondents.

17. The other decision that was relied on is by a Bench of this Court in *Thiruvengada Varadachariar* v. *Srinivasa Iyengar*[3]. The plaintiffs and defendants 3 and 4 were the descendants of one Chinna Ramanuja Ayyangar. The suit was laid for recovery of possession of the plaint mentioned temple called Sri Venugopalaswami temple, Katteri, Mannargudi, and the immovable properties described in the plaint. According to the plaintiffs, the lands belonged to the suit temple and they and defendants 3 and 4 were the sole hereditary trustees thereof. It was further alleged that the members of the family appointed one Ranganatha Iyengar, father of the second defendant and paternal uncle of the first defendant,

1. 83 L.W. 768; A.I.R. 1971 Mad. 253.

1. (1966) 2 M.L.J. 13.
2. (1967) 1 S.C.R 280: A.I.R. 1967 S.C. 781.
3. (1973) 1 M.L.J. 266.

to manage the temple on behalf of the members of the family till the hereditary trustees came to an amicable arrangement amongst themselves about the management. The plaintiff's case was that Ranganatha Iyengar took possession of the temple and its properties in pursuance of the request on behalf of the family and was functioning as an agent from the date of the deed of agency, namely, 28th October, 1926. After the death of Ranganatha Iyengar, the second defendant was requested to look after the temple properties. As the second defendant was unable to continue, the first defendant was requested to look after the temple and the properties on behalf of the hereditary trustees. The plaintiffs issued a notice on 10th February, 1962, terminating the agency and calling upon him to deliver possession of the temple and the properties. The case of the defendants was that neither the plaintiffs nor defendants 3 and 4 were hereditary trustees of the temple, that the properties mentioned in the plaint were kattalai properties constituting a specific endowment for the purpose of performing certain services connected with the temple of Sri Venugopalaswami and that the lands were endowed by the mirasdars as a specific endowment by a document of the year 1861. Several other allegations were also made by the first defendant denying title of the plaintiffs to institute the suit. The relief claimed in the suit was for recovery of possession of the temple and its properties from defendants 1 and 2 and for a decree directing the first defendant to render a true and proper account of the income, and other reliefs. One of the defences that was taken by the defendants was that the suit was barred under section 63 of the Act. According to the defendants, the remedy of the plaintiffs was to invoke the jurisdiction of the Deputy Commissioner for a declaration that the plaintiffs were hereditary trustees and that the suit properties were not kattalai properties, but belonged to the temple. The Bench came to the conclusion that the office of hereditary trustee had devolved only in the plaintiffs' family and it was only on the basis of such assertion of title that the relief of possession was asked for from defendants 1 and 2 though the relief as to declaration of the right to hereditary trusteeship was not stated in so many words in the plaint. The Bench proceeded to observe that the fact that the Deputy Commissioner cannot grant the relief of possession is not a ground to hold that the suit is maintainable, and on a reading of the plaint as a whole, it irresistibly followed that only if the plaintiffs established that they and defendants 3 and 4 were hereditary trustees, they can succeed in getting the reliefs asked for, and one of the main issues that arose for consideration was whether the plaintiffs and defendants 3 and 4 were hereditary trustees and for deciding that issue, express provision is made in section 63 of Act XXII of 1959 and in such circumstances, the suit was barred by section 108 of that Act. The reasoning and the conclusion arrived at by the Bench is not in conformity with the decision of the Supreme Court in *V. L. N. S. Temple* v. *I. Pattabhirami*[1], and of this Court in *Agasthiappa Mudaliar* v. *Manikca Gounder and 3 others*[2] *Pachamuthu Nadar* v. *T. P. Temple Charity*[3]. In fact, the attention of the Bench was not drawn to the decision of the Supreme Court in *V.L.N.S. Temple* v. *I. Pattabhirami*[1], and that of this Court in *Pachamuthu Nadar* v. *T.P. Temple Charity*[3]. The law laid down by the Supreme Court in the decision referred to above is that section 93 of the Act will apply only to matters for which provision has been made in the Act. It does not bar suits under the general law which do not fall within the scope of any of the sections of the Act. Strictly construed this would mean that when any relief is asked for which could not be granted under the Act, a civil suit is not barred. This Court has further laid down the position in the above two decisions that the jurisdiction of the civil Court to try a suit and issues arising incidentally though such issues would fall within the jurisdiction of the Deputy Commissioner, is not barred. The observation of the Bench in *Thiruvengada Varadachariar* v. *Srinivasa Iyengar*[4], that one of the main issues that arises for consideration is whether the plaintiffs and defendants 3 and 4 are hereditary trustees and for deciding that issue, express provision is made in section 63 of Act XXII

1. (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781.
2. S.A. No. 117 of 1959.
3. (1970) 83 L.W. 768 : A.I.R. 1971 Mad. 253.
4. (1973) 1 M.L.J. 266.

of 1959 and hence the suit is barred by section 108 of that Act is difficult to reconcile with the view expressed by the Supreme Court and this Court in the decisions referred to above.

18. It may be noted that the scheme of the Tamil Nadu Hindu Religious and Charitable Endowment Act regarding the jurisdiction of the civil Court is different from enactments like the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). Section 93 of the Act would provide that no suit in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act shall be instituted in any Court except under and in conformity with the provisions of the Act. What the Act contemplates is that if provision is made for determining or deciding certain matters or disputes that should be followed before a civil Court is approached. Sections 57 and 58 provide for enquiry and decision on certain disputes and matters and for providing administration and management to a religious institution. Against the decision of the Deputy Commissioner, an appeal is provided to the Commissioner and against the Commissioner's order, suits in the civil Court are provided. In fact, in respect of several matters, a suit in the civil Court is provided for in the Act itself. For example, under section 31 (4) the trustee is empowered to institute a suit in a civil Court against the order of the Commissioner regarding the utilisation of the surplus funds of the endowments. An order passed validating past appropriation of surplus funds is liable to be questioned in a civil Court under section 31-A of the Act. A suit in a civil Court can be filed under section 52 praying for a decree to remove the trustee of a math or specific endowment attached thereto, for anyone of the reasons stated in the section. Under section 39 (4), where the Commissioner appoints a non-hereditary trustee or trustees, the hereditary trustee or trustees may file an application to the Court to set aside or modify such an order. Any scheme for the administration of a religious institution settled or modified by the Court in a suit may be modified or cancelled by the Court on an application made to it by the Commissioner, the trustee or any person having interest, under section 62 (3) (*a*) of the Act. Under section 74 (5), an application can be made to a civil Court against an order of surcharge against a trustee; section 87 of the Act provides that against the order of a Presidency Magistrate or a Magistrate of the first-class directing delivery to the person appointed of possession of a religious institution, records, accounts and properties thereof, a suit by the person aggrieved for establishing his title to the said properties is not barred. The proviso to section 87 clearly reserves the right of the person aggrieved by an order under section 87 to establish his title to the said property. Relief as to title cannot be had before the Deputy Commissioner and at any stage, a suit for declaration of title is maintainable in a civil Court. The proviso to section 87 cannot be construed as meaning that a civil Court gets jurisdiction to decide dispute as to title only after an adverse order is passed under section 87 of the Act.

19. In effect, the aim of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1951 is not to exclude the jurisdiction of the civil Court, but to facilitate proper administration of religious institutions by following the procedure prescribed to pursue the remedy before the Deputy Commissioner and the Commissioner before filing a suit. Under the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948 (XXVI of 1948), in proceedings relating to the grant of patta under sections 12 to 14, section 15 provides that the decision of the tribunal regarding claims under sections 12, 13 and 14 by the landholder is final and not liable to be questioned in any Court of law. The provision excluding the jurisdiction of the civil Court is more specific. Though section 64 (*c*) of the Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act, 1948, provides that any order passed by the Government or any of the authorities under the Act shall, subject only to any appeal or revision provided by or under Act, be final, it has been held that the finality is only in respect of the matters to be determined for the purpose of this Act and that there is no machinery in the Act to determine

whether a land in the estate is a ryoti land or a communal land and a decision as to the question of title by the statutory authorities is only an incidental matter which would not preclude a civil Court independently enquiring into title in a properly constituted suit. Thus in the special enactments, the jurisdiction of the special Tribunals under the Act is confined only to the purposes of the Acts. As already pointed out, the procedure prescribed under the Act regarding the matters specified in section 57 should be followed before the Deputy Commissioner and in the appeal or revision before the Commissioner, before a suit is filed. A relief which cannot be granted by the Deputy Commissioner can be asked for in a civil Court. If, in deciding whether the plaintiff is entitled to the relief asked for, the civil Court also has to decide certain issues which may fall within section 57 of the Act, the civil Court's jurisdiction is not barred. There is no provision for reference by the civil Court of a particular issue which is within the scope of section 57 to the Deputy Commissioner for determination. Equally, the plaintiff who seeks relief from a civil Court cannot be asked to get adjudication of an incidental question from the Deputy Commissioner before he filed a suit. Therefore, the preponderance of authority of our Court is that a civil suit is not barred in respect of a relief which cannot be granted by the Deputy Commissioner and that in such a suit, the civil Court has jurisdiction to decide incidental issues which are within the jurisdiction of the Deputy Commissioner.

20. In the suit before us, the relief that was claimed was a declaration of title so far as the plaintiff is concerned. The other issue that incidentally fell to be decided was whether there was a valid dedication. In our view, this question can be gone into by the civil Court. We are therefore unable to agree with the conclusion of Srinivasan, J., in Second Appeal No. 935 of 1963. We hold that in the instant case, section 93 is not a bar to the institution of the suit.

21. In the result, we allow the Letters Patent Appeal and remand the matter to the trial Court for disposal of the suit in accordance with law. The trial Court will dispose of the suit as expeditiously as possible. There will be no order as to costs in this appeal.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and S. Natarajan, JJ.*

Dr. S. Subramania Iyer .. *Appellant**

v.

The Secretary, The Karaikudi Co-operative Town Bank, Karaikudi .. *Respondent.*

S. Ramaswami Iyer .. *Petitioner*

v.

The Special Officer, The Karaikudi Co-operative Town Bank, Karaikudi, .. *Respondent.*

Dr. S. Subramania Iyer .. *Petitioner*

v.

The Special Officer, The Karaikudi Co-operative Town Bank, Karaikudi .. *Respondent.*

and

V. S. S. Mani and others .. *Petitioners.*

v.

The Special Officer, The Karaikudi Co-operative Town Bank, Karaikudi and another .. *Respondents.*

(A) *Civil Procedure Code (V of 1898), section 96—Madras Co-operative Societies Act (VI of 1932), section 49 (2)—Order under—Appeal under section 96, Civil Procedure Code—Competency.*

An appeal lies under section 96 of the Civil Procedure Code, against an order of the District Judge under section 49 (2) of the Madras Co-operative Societies Act, 1932. [*Para. 2.*]

*Appeal No. 263 of 1966 and C.R.P. No. 543, 1408 and 1491 of 1966. *29th March, 1973*

Section 49 (2) of the Madras Co-operative Societies Act does not state that the application should be preferred to a District Judge but states that the application should be preferred to the District Court having jurisdiction. If the section had provided for an application to the District Judge or to any particular Judge of the City Civil Court an argument may be available that such a judicial officer functions as a *persona designata* and that consequently all the procedural law applicable to the Court in question will not apply to the particular proceeding of the Judge concerned. On the other hand section 49 (2) provides for an application being preferred to the Court as such and therefore the general principle that all the laws governing the procedure before the Court will apply to the particular proceeding also will prevail. [*Para.* 3.]

Further there is absolutely no provision whatever in the Act to regulate the procedure before the District Court in proceedings under section 49 (2). From this the only conclusion is that the proceedings before the District Court will be governed by the rules and practice applicable to the other proceedings before that Court and, on that basis, an appeal will lie against the decision of the District Court. [*Para.* 4.]

(B) *Madras Co-operative Societies Act* (*VI of* 1932), *section* 49 (1)—*Scope—When attracted.*

To bring a case within the scope of section 49 (1) the following conditions must be satisfied: (1) It should appear that any person who has taken part in the organisation or management of the society or any past or present officer of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society; and (2) it must so appear in the course of an audit under section 37 or an enquiry under section 38 or an inspection under section 39 or on the winding up of a society. Only when both these conditions are cumulatively satisfied, the Registrar may, of his own motion or on the application of the committee or liquidator or any creditor or contributory, examine into the conduct of the person concerned and make an order requiring him to repay or restore the money or property or any part thereof. [*Para.* 5.]

In the present case the second condition was not satisfied and hence section 49 (1) was not attracted. [*Para.* 7.]

Cases referred to :

Appu v. *Executive Officer, P. C. C. Society, Thazhecode,* (1962) K.L.T. 393; *Adaikappa* v. *Chandrasekhara,* I.L.R. (1958) Mad. 505: 74 I.A. 264 : (1948) 1 M.L.J. 41: A.I.R. 1948 P.C. 12; *Sundaram Iyer* v. *Deputy Registrar of Co-operative Societies,* (1956) 2 M.L.J. 613: I.L.R. (1957) Mad. 371 : 69 L.W. 947: A.I.R. 1957 Mad. 634; *Chikkanna Chettiar* alias *V. S. Nanjappa Chettiar* v. *V. S. Perumal Chettiar and another,* (1940) 1 M.L.J. 732: I.L.R. (1940) Mad. 791: A.I.R. 1940 Mad. 474; *Rajagopala Chettiar* v. *The H. R. & C. E. Board, Madras,* 66 M.L.J. 43 : I.L.R. 57 Mad. 271 : A.I.R. 1934 Mad. 103 (2); *Ramachandra Rao* v. *Ramachandra Rao,* (1922) 49 I.A. 129: I.L.R. 45 Mad. 320: 43 M.L.J. 78: A.I.R. 1922 P.C. 80; *Bhagwati* v. *Ramkuli,* (1939) 66 I.A. 145 : (1939) 2 M.L.J. 98; *South Asia Industries (P.) Ltd.* v. *S. B. Sarup Singh,* (1966) 2 S.C.J. 69 : (1965) 2 S.C.R. 756, A.I.R. 1965 S.C. 1442 ; *Pentakota Sriramulu* v. *Co-operative Marketing Society Ltd., Anakapalli and another,* (1965) 2 S.C.J. 627: (1965) 2 An.W.R. (S.C.) 111: (1965) 2 M.L.J. (S.C.) 111: (1965) 1 S.C.R. 186: A.I.R. 1965 S.C. 621.

Appeal No. 263 of 1966.

Appeal against the decree of the Court of the District Judge of Ramanathapuram at Madurai in O.P. No. 19 of 1964.

C.R.P No. 543 of 1966.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Judge of Ramanathapuram at Madurai in O.P. No. 17 of 1964.

C.R.P. No. 1408 of 1966.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Judge of Ramanathapuram at Madurai in O.P. No. 19 of 1964.

C.R.P. No. 1491 of 1966.

Petition under section 115 of Act V of 1908 praying the High Court to revise

the order of the District Judge of Ramanathapuram at Madurai in O.P. No. 21 of 1964.

K. Parasaran, S. Sampath Kumar, V. Aravamudhan, A. Sundaram Iyer and *S. V. Jayaram*, for Appellant.

N. C. Raghavachari, N. S. Varadachari and *G. Rangadurai*, for Respondents.

The Judgment of the Court was delivered by

Ismail, J—A. S. No. 263 of 1966 and C.R.P. No. 1408 of 1966, have been preferred by one and the same person against the judgment of the learned District Judge of Ramanathapuram at Madurai in O.P. No.19 of 1964, on his file preferred under section 49 (2) of the Madras Co-operative Societies Act, 1932, hereinafter referred to as the Act. C R.Ps. Nos. 543 and 1491 of 1966, have been preferred by the petitioners in O.P. Nos. 17 and 21 of 1964, on the file of the same Court, preferred under section 49 (2) of the Act. The Special Officer, Karaikudi. Co-operative Town Bank, Karaikudi, is the common respondent in all these proceedings. The said original petitions were preferred to the District Court, Ramanathapuram at Madurai under section 49 (2) of the Act to set aside the order of the Deputy Registrar of Co-operative Societies, Sivaganga, in A.R.C. No. 1321 of 1961-62, dated 31st August, 1963. The petitioners in these civil revision petitions were the office bearers of the Co-operative Bank and they were the defendants in A.R C. No. 1321 of 1961-62 before the Deputy Registrar of Co-operative Societies, Sivaganga. That was a claim preferred under section 49 (1) of the Act praying for a decree against defendants 1 to 8 therein for a sum of Rs. 3,415.59. The appellant was the ex-President of the Co-operative Bank, while the petitioner in C.R.P. No. 543 of 1966, was the ex-Secretary of the Bank and the petitioners in C.R.P. No. 1491 of 1966, were the ex-Directors of that Bank. The plaint preferred before the Deputy Registrar of Co-operative Societies stated that, according to the by-laws of the Bank, loans shall be given only to members whose share values have been fully paid up and that on 25th February, 1948 defendants 1 to 7 sanctioned a long term loan of Rs. 3,000 to one Sri C. Subramaniavathiar on the mortgage of his house on the recommendation of the eighth defendant and that in sanctioning the said loan proper care was not taken to safeguard the insterests of the Bank. The factual allegation was that the loan was sanctioned on 25th February, 1948 in a hurry without taking into consideration the title deeds and that, in the absence of legal opinion, surveyor report etc., the applicant Subramaniavathiar was sanctioned admission as a member and allotted 60 shares in the same meeting Consequently the gravamen of the charge was that the ex-President, the ex-Secretary and the ex-Directors acted in violation of the by-laws of the Bank in so far as they sanctioned loan on 25th February, 1948 when the person concerned got enrolled himself as a member by paying the share capital only on 27th February, 1948. The Special Officer alleged that by infringing the by-laws of the Bank and other rules and regulations and by their illegal and high-handed act, they had committed a breach of trust in relation to the Bank and consequently they were liable to be surcharged under the provisions of section 49 of the Act. The petitioners herein denied their liability under section 49. Overruling their defence, the Deputy Registrar of Co-operative Societies passed an order on 31st August, 1963 directing defendants 1 to 8 to pay a sum of Rs. 3,415.59 with interest at 6¼ per cent. from 1st June, 1963 till the date of realisation. It is to set aside this order, they preferred the original petitions referred to above before the District Court, Ramanathapuram at Madurai, under section 49 (2) of the Act. The learned District Judge on 21st July, 1965 dismissed the said petitions. It is the correctness of the conclusion of the learned District Judge that is challenged before us in the appeal and the civil revision petitions referred to above.

2. The respondent in A.S. No. 263 of 1966, is the Special Officer of the Co-operative Bank. A preliminary objection has been taken as regards the maintainability of this appeal. From one point of view, it may not be necessary to decide this question, since the appellant has preferred, as we have already pointed out, C.R.P. No. 1408 of 1966 also

Nonetheless, since the point was argued before us, and both the sides requested us to decide the question, we would like to express our opinion with regard to the maintainability of the appeal itself. The learned Counsel for the respondent contended, relying on a judgment of the Kerala High Court in *Appu* v. *Executive Officer, P. C. C. Society Thazhecode*[1], that no appeal lies against an order of the District Judge under section 49 (2) of the Act. The reasoning of the Kerala High Court can be found in the following observation :

"The proceeding before the District Judge was not a suit and the order does not fall within the definition of a decree in the Code of Civil Procedure. The question of appealability of an order of the District Judge under section 49 of Act VI of 1932 (Madras) did not arise in the latter case. Their Lordships were only disposing of a writ petition to prohibit the Deputy Registrar of Co-operative Societies from proceeding with certain plaints filed under section 51 of Act VI of 1932 (Madras). My attention was also drawn to a decision of this Court reported in (1959) K.L.T. 334 : (1959) K.L.R. 233. That was an appeal from an order dismissing a petition by a debtor for relief under Act XXXI of 1958 (Kerala). The petition was dismissed on the ground that the petitioner was not an agriculturist and that that Court had no jurisdiction to entertain the petition. Reliance was placed on the decision of the Privy Council referred to earlier and it was held that the order was appealable. An order under Act XXXI of 1958 (Kerala), for scaling down a debt covered by a decree effects a partial or complete discharge or satisfaction of the decree and hence falls within the definition of a decree in the Code of Civil Procedure, and is appealable. The position here is different and the decision cited cannot apply to the facts of this case. It cannot be said that the order of the District Judge is a decree as defined by the Code of Civil Procedure. The preliminary objection must therefore be sustained".

1. (1962) Ker.L.T. 393.

The two decisions referred to in the above extract are the decision of the Privy Council in *Adaikappa* v. *Chandrasekhara*[1], and that of this Court in *Sundaram Iyer* v. *Deputy Registrar, Co-operative Societies*[2]. In the Privy Council case, the Privy Council stated thus:

"The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal".

The learned Counsel for the respondent relied upon the above decision of the Kerala High Court in support of her contention that the decision is directly in point and holds that no appeal lies against the decision of the District Judge. Mr. K. Parasaran, learned Counsel for the appellant, on the other hand, relies upon the statement of law as contained in the judgment of the Privy Council referred to above and contends that once a matter has been taken to a regularly constituted Court, the procedure applicable to the other proceedings of that Court will also apply to the particular proceedings also unless the statute restricts the applicability of that procedure and prescribes a special procedure and that in this case the Act having provided for the matter being considered by the District Court and not having provided for a special procedure, the ordinary procedure applicable to the proceedings before the District Court will apply to this case also and consequently the appeal will lie against the decision of the District Court. Apart from this, he also relied on a decision of a Full Bench of this Court in *Chikkanna Chettiar* alias *V. S. Nanjappa Chettiar* v. *V. S. Perumal Chettiar and another*[3] in which the decision of an earlier Full Bench decision of this Court in *Rajagopala Chettiar* v. *The Hindu Religious Endowments*

1. I.L.R. (1948) Mad. 505 : 74 I.A. 264 : (1948) 1 M.L.J. 41 : A.I.R. 1948 P.C. 12.
2. (1956) 2 M.L.J. 613 : I.L.R. (1957) Mad. 371 : 69 L.W. 947 : A.I.R. 1957 Mad. 634.
3. (1940) 1 M.L.J. 732 : I.L.R. (1940) Mad. 791 : A.I.R. 1940 Mad. 474.

Board, Madras[1], was held to be not authoritative. The decision in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[1], dealt with the question whether an order passed by the District Judge under section 84 (2) of the Hindu Religious Endowments Act, Act II of 1927, on an application made to the District Court to set aside the decision of the Hindu Religious Endowments Board passed under section 84 (1) of that Act was appealable to the High Court. The Full Bench held that the said decision was not appealable to the High Court. For coming to this conclusion, the Court relied on the definition of the term decree in section 2, clause (2) of the Code of Civil Procedure, and pointed out that though the decision of the District Judge would fulfil all the other requirements of the definition of a decree as contained in section 2, clause (2) of the Code of Civil Procedure, yet it would not be a decree because the order was not passed by the District Judge in a suit, but only in an application. It is this judgment of the Full Bench that was declared to be not authoritative by the later Full Bench which considered the question of the appealability of an order passed by a Subordinate Judge appointed by the Provincial Government under section 3 (*d*) of the Land Acquisition Act of 1894 to decide a dispute referred by the Collector under section 30 of that Act. This Full Bench after an elaborate consideration of the question and after referring to the earlier Full Bench decision to which we have drawn attention held that the said order was appealable and the decision of the earlier Full Bench was not authoritative. This conclusion was come to on the interpretation of the decisions of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[2], and in *Bhagwati* v *Ram Kali*[3], As we pointed out already, the only reason given by the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[1], for coming to the conclusion that the order passed by the District Judge under section 84 (2) of Madras Act II of 1927 was not a decree was the consideration that section 2 (2) of the Code of Civil Procedure referred to a decree only when the order was passed in a suit and not in an application. It is that conclusion which was held to be not authoritative by the later Full Bench. In view of this and having regard to the statement of law laid down by the Privy Council in *Adaikappa* v. *Chandrasekhara*[1], we hold that the present appeal is maintainable.

3. We may also refer to one other consideration in this behalf. Section 49 (2) of the Act does not state that the application should be preferred to a District Judge but states that the application should be preferred to the District Court having jurisdiction. As a matter of fact, with regard to the City of Madras, the section proceeds to state that the application should be preferred to the City Civil Court as such. If the section had provided for an application to the District Judge or to any particular Judge in the City Civil Court, an argument may be available that such a Judicial Officer functions under sub-section (2) of section 49 as *persona designata* and that consequently all the procedural law applicable to the Court in question will not apply to the particular proceedings of the Judge concerned. On the other hand, section 49 (2) provides for an application being preferred to the Court as such and therefore the general principle that all the laws governing the procedure before this Court will apply to the particular proceedings also, will prevail.' After examining the authorities in this behalf, the Supreme Court in *South Asia Industries (P.) Ltd.* v. *S. B. Sarup Singh and others*[2]. stated:

> "A statute may give a right of appeal from an order of a tribunal or a Court to the High Court without any limitation thereon. The appeal to the High Court will be regulated by the practice and procedure obtaining in the High Court. Under the rules made by the High Court in exercise of the powers conferred on it under section 108 of the Government of India Act, 1915, an appeal under section 39 of the Act

1. (1934) 66 M.L.J. 43 : I.L.R. 57 Mad. 271 : A.I.R. 1934 Mad. 103 (2).
2. (1922) 49 I.A. 129 : I.L.R. 45 Mad. 320 : 43 M.L.J. 78 : A.I.R. 1922 P.C. 80.
3. (1939) 66 I.A. 145 : (1939) 2 M.L.J. 98.

1. 74 I.A. 264 : I.L.R. (1948) Mad. 505 : (1948) 1 M.L.J. 41 : A.I.R. 1948 P.C. 12.
2. (1966) 2 S.C.J. 69 : (1965) 2 S.C.R. 756 : A.I.R. 1965 S.C. 1442.

will be heard by a single Judge. Any judgment made by the single Judge in the said appeal will, under clause 10 of the Letters Patent, be subject to an appeal to that Court. If the order made by a single Judge is a judgment and if the appropriate Legislature under clause 3 of Letters Patent has, expressly or by necessary implication, not taken away the right of appeal, an appeal shall lie from the judgment of a single Judge under clause 10 of the Letters Patent to the High Court".

It is pertinent to point out that one of the earlier decisions examined by the Supreme Court for coming to this conclusion was the decision of the Privy Council in *Adaikappa* v. *Chandrasekhara*[1].

4. One other significant feature is, there is absolutely no provision whatever in the Act to regulate the procedure before the District Court in proceedings under section 49 (2) of the Act. If the argument of the Counsel for the respondent is to be accepted, it will follow that there is no special procedure prescribed by the statute for dealing with an application preferred under section 49 (2) and at the same time the provision contained in the Code of Civil Procedure also will not apply. Certainly an argument which will lead to such an absurd conclusion cannot be countenanced by any Court and there being nothing in the statute making special provision for the procedure to be followed by the District Court in disposing of an application under section 49 (2) of the Act, the only conclusion is that the proceedings before the District Court will be governed by the rules and practice applicable to the other proceedings before that Court and on that basis an appeal will lie against the decision of the District Court.

5. On the merits, Mr. K. Parasaran, the learned Counsel for the appellant in the appeal as well as the petitioner in C.R.P. No. 1408 of 1966, contended that in the present case the requirements of section 49 (1) have not been complied with and therefore the order passed by the Deputy Registrar, confirmed as it is by the learned District Judge, cannot be sustained. Section 49 (1) of the Act is as follows:

"Where in the course of an audit under section 37, or an inquiry under section 38 or an inspection under section 39, or the winding up of a society, it appears that any person who has taken part in the organisation or management of the society or any past or present officer of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society, the Registrar may, of his own motion or on the application of the committee or liquidator or any creditor or contributory, examine into the conduct of such person or officer and make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate as the Registrar thinks just or to contribute such sum to the assets of the society by way of compensation in respect of the misappropriation, fraudulent retainer or breach of trust as the Registrar thinks just."

Thus it will be seen that to bring a case within the scope of this section the following conditions must be satisfied: (1) It should appear that any person who has taken part in the organisation or management of the society or any past or present officer of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society. (2) It must so appear in the course of an audit under section 37, or an enquiry under section 38 or an inspection under section 39, or the winding up of a society. Only when both these conditions are cumulatively satisfied, the Registrar may of his own motion or on the application of the committee or liquidator or of any creditor or contributory, examine into the conduct of the person concerned and make an order requiring him to repay or restore the money or property or any part thereof. In this particular case, Mr. Parasaran's contention is that there has been no audit under section 37, or an enquiry under section 38, or an inspection under section 39 and there had been no winding up of the Bank and consequently the section is not attracted and that therefore the Deputy Registrar had no jurisdiction to proceed under that section. In

1. (1948) 1 M.L.J. 41 : I.L.R. 1948 Mad. 505: 74 I.A. 264: A.I.R. 1948 P.C. 12.

support of this contention the learned Counsel relied on the decision of the Supreme Court in *Pentakota Sriramulu* v. *Co-operative Marketing Society Ltd. Anakapalli and another*[1]. There the Supreme Court pointed out thus:

> "The facts giving rise to the charge have to be disclosed in the course of an audit under section 37 or an enquiry under section 38 or an inspection under section 39 or on the winding up of the Society. Mr. Ram Reddy while not disputing that unless this condition is also satisfied section 49 would not be attracted, however submitted that there was an enquiry under section 38 preceding the supersession and that in consequence the condition was fulfilled. It is true that there was an enquiry conducted into the affairs of the Society under section 38, but that by itself is not sufficient. It has further to be proved that the facts alleged in the claim, and on which it is based, were disclosed at that enquiry".

Thus the decision of the Supreme Court in that case fully supports the contention of the learned Counsel. Consequently we have to examine whether in this particular case this requirement namely, that the facts which gave rise to the charge were disclosed in the course of an audit under section 37, or an enquiry under section 38 or an inspection under section 39, or the winding up of the society, is satisfied or not. No material whatever is placed before us to show that the facts were disclosed under any one of those conditions. All that the Deputy Registrar has stated in his order is this:

> "An enquiry under section 38 of the Madras Co-operative Societies Act VI of 1932 was said to have been ordered into the working, constitution and financial condition of the bank before filing the claim. The cause of action to file the claim is considered to have arisen out of the findings in the enquiry and so the claim is sustainable under section 49 of the Madras Co-operative Societies Act".

The learned District Judge who disposed of the said contention raised before him merely reproduced what the Deputy Registrar has stated without satisfying himself as to whether there was actually an enquiry under section 38, and during the course of that enquiry, the facts which gave rise to the charge were disclosed. Even before us, the learned Counsel for the respondent was not able to draw our attention to any material available before the Court to show that the requirement of the section in this behalf was satisfied, namely, that the facts which gave rise to the charge in question were disclosed in the course of an enquiry under section 38. In view of this alone the learned Counsel for the respondent, prayed for a remand, so that the respondent may have an opportunity to place the necessary materials, if any, before the Court. We are unable to accede to this request in view of the fact that the matter had been pending for a long time and that there is absolutely no explanation whatever as to why the said materials, if they were available could not be placed either before the Deputy Registrar or before the lower Court. Under these circumstances, we see no justification for making an order for remand.

6. In view of our conclusion that the requirements of section 49 (1) have not been complied with, we are not going into the merits of the charge levelled against the appellant and the petitioners herein as to whether they have committed any breach of trust in relation to the Bank which alone was the charge mentioned in the plaint preferred before the Deputy Registrar of Co-operative Societies, Sivaganga.

7. On the ground that the requirements of section 49 (1) of the Act have not been satisfied and consequently the Deputy Registrar in the first instance, and the District Court under section 49 (2) of the Act had no jurisdiction to pass the orders in question against the appellant and the petitioners herein, we allow the appeal and the civil revision petitions and set aside the order of the learned District Judge, dated 21st July, 1965, confirming the order of the Deputy Registrar, dated 31st August, 1963. The appellant in A.S. No. 263 of 1966 will be entitled to his costs and the petitioners

1. (1965) 2 S.C.J. 627 : (1965) 2 An.W.R (S.C.) 111: (1965) 2 M.L.J. (S.C.) 111 : (1965) 1 S.C.R. 186: A.I.R. 1965 S.C. 621.

in C.R. Ps. Nos. 543 and 1491 of 1966 also are entitled to their costs from the respondent. There will be no order as to costs in C.R.P. No. 1408 of 1966.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*T. Ramaprasada Rao, J.*

VE. A. Vairavan Chettiar by Power of Attorney Agent, M. L. S. M. Subramanya Chettiar and others .. *Petitioners**

v.

Mayuram Municipal Council by its Commissioner and others .. *Respondents.*

Madras Town Planning Act (VII of 1920), sections 27 (1) (d), 29, 12, 23—Betterment contribution—Nature of levy—Legal exaction in view of works—Neither a fee nor a tax—Draft scheme of Town Planning—Submission of—Extension of time by Government—Power to extend—Relevant date for fixing market value—Appellate authority—Persona designata—*No power of remand—Constitution of India, Article 226, Concurrent List—Item* 20.

Betterment contribution is a contribution or levy made on the owners of the properties in a Scheme for the common purpose of economic and social development of the inside and outside of the specified area. The claim for betterment levy is a sanctioned legal exaction in lieu of works, improvements and planning done to a specified area, known as Town Planning Scheme Area which, under the Town Planning Act, is not intended to e done gratuitously. [*Para.* 5.]

It is not a fee because it is not periodical nor is it referable to any periodical services to be rendered by the Corporation or the Municipality to the property-owners. It is not a tax because all the citizens are not called upon to suffer the charge. It is a peculiar demand veiled in social economy and characterised by practical development. It is a contribution for a common purpose demanded by a statutory agency created under the (Town Planning) Act. The demand is justified on the ground that it is, in any event, a demand arising from legislative mandate and which legislation would fall under the Concurrent List, item 20. [*Para.* 5.]

The Government while extending the time for the submission of a draft for planning scheme exercises its original power and if the situation is viewed in that light, then every such occasion should be understood as a due exercise of power by the Government under section 12 of the Act. Thus understood, the last date of the order under which the Government extended the time for the preparation and submission of the Scheme by the Municipality should be the relevant date for all purposes including the date for the fixation of the market value of the properties for claiming betterment contribution under section 23 of the Act read with the relevant clause of the scheme. The power of the State Government to vary or revoke is entirely unrestricted except that before acting it should give the persons affected an opportunity of preferring objections. [*Paras.* 6 *and* 7.]

In the instant case, the appellate authority remanded the subject-matter to the arbitrator to reckon the market value of the properties. This was challenged by the petitioners on the ground that the appellate authority was a *persona designata* and had no power to remand.

Held, that the learned District Judge, as the appellate authority had no jurisdiction to remand the subject-matter. [*Para.* 9.]

Cases referred to :

Chingalvaroya Chetti v. *Special Deputy Collector*, A.I.R. 1953 Mad. 348 : (1952) 2 M.L.J. 863; *Maneklal Chottalal* v. *M. G. Makwana*, A.I.R. 1967 S.C. 1373 : (1967) 3 S.C.R. 65: (1968) 1 S.C.J. 379; *Radhakrishnan Chettiar* v. *State of Madras*, I.L.R. (1958) Mad. 95 : (1956) 2 M.L.J. 279; *Chengalvaroya Chetty* v. *State of Madras*, (1958) 1 M.L.J. 253; *Ranganathan* v. *Krishnayya*, I.L.R. (1947) Mad. 113 : (1946) 1 M.L.J. 255: A.I.R. 1946 Mad. 504.

*W.P. Nos. 514, 515, 633, 899, 1251 to 1253 and 1549 to 1580 of 1971. *17th February*, 1973.

Balakrishna Mehta v. *Corporation of Madras*, I.L.R. (1962) Mad. 137: (1962) 1 M.L.J. 92) : A.I.R. 1962 Mad. 7; *Municipal Council, Nellore* v. *Veerabhadra Rao*, (1956) An.W.R. 1158 : (1956) An.L.T. 774.

Petitions praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records of the proceedings of the District Judge, East Thanjavur at Nagapattinam in C.M.A. Nos. 117, 74, 128, 99, 114, 105, 77, 107, 113, 75, 78, 71, 70, 51, 96, 63, 119, 44, 52, 116, 85, 129, 67, 104, 130, 49, 43, 123, 92, 100, 72, 83, 110, 89, 80, 76, 62, 102 and 122 of 1968 and quash the orders made therein dated 31st August, 1970 in W.P. Nos. 514, 515, 633, 899, 1251, 1252, 1253, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579 and 1580 of 1971.

K. Parasaran, V. Sridevan, V. Vedantachari and *V. Rathna Mudaliar*, for Petitioners.

T. Sathiadev and *K. Alagiriswami*, for Respondents.

The Court made the following

ORDER.—In this batch of writ petitions, a common question is raised. The facts in W.P. No. 514 of 1971 can be perused, for understanding the relevant facts arising in this batch. Under the provisions of the Madras Town Planning Act, 1920, (hereinafter referred to as the Act) the State of Tamil Nadu called upon the Mayuram Municipal Council, under section 12 of the Act to prepare, publish and submit for their sanction a draft scheme as respects lands in regard to which a town planning scheme may be made. This notification in the official Gazette was made on 2nd May, 1944 and the Municipal Council was granted time till 10th March, 1945, for such preparation and submission. The Municipal Council did not send up the draft scheme as mandated from time to time; the Municipality requested for time to submit the draft scheme for the sanction of the State Government. As a matter of fact, several applications were made seeking for such extension during the years 1945, 1946, 1947, 1949, 1950, 1951, 1953, 1954 and 1955. Some applications were made at a time when the last date fixed for the submission of such draft schemes and as notified by the Government had expired. Some applications, however, were made in time. The Government acting on such applications extended the time for the preparation, publication and submission of the draft scheme by the Municipality and the last order in which the final extension was made by the Government was on 13th June, 1956 under which the Municipality was to prepare and submit the draft town planning scheme by 31st December, 1956. This time the Municipality submitted such a scheme and after due observance of the formalities required under section 13, the State Government after considering the objections and suggestions in and over the draft scheme so submitted by the Municipality and after making such enquiry as they deemed fit, sanctioned, what is known as, "Pattamangalam Extension Town Planning Scheme, Mayuram". Such a sanction was made under section 14 (3) of the Act on 23th January, 1961. Under the provisions of the scheme, which provided for the laying of roads and providing various amenities in the area comprised in the town planning scheme, a provision was made for the preference of claims for betterment contribution under section 23 of the Act. Originally, the period within which such claims, should be made was fixed at two years; but it is common ground that the time for submission of such claims was extended by four years by the Government in exercise of their powers under section 15 of the Act. Under clause 22, the betterment contribution may be levied for a term of 10 years after the execution of the scheme at a uniform rate of 6¼ per cent of the increase in value calculated in accordance with the provisions of the Act. Such schemes were made by the Municipality and were filed before the statutory authority known as the arbitrator appointed for the purpose under section 27 of the Act. One of the functions of the arbitrator so appointed is to entertain such applications filed by the Municipality for the determination of the quantum of betterment contribution as also the nature of liability of landowners inside the town planning scheme. Section 27 (1) (*d*) provides that an arbitrator appointed by the State Government has

the power to determine, in reference to the claims made, the properties which are liable to the betterment contribution under section 20 and estimate and record their market value at the date of the notification under section 10 or section 12, as the case may be, in accordance with the provisions of clause (*a*) of section 24. Section 24 enumerates the principles under which the betterment contribution shall be levied. The arbitrator, who so entertained the claims, dismissed them on the ground that no property inside the scheme is liable to contribute towards betterment contribution and even if it becomes necessary for him to fix the value of the properties inside the scheme area under section 27 (1) (*d*) of the Act, the relevant date was 13th June, 1956 which is the last date on which the Government extended the time for the Municipality to submit the draft schemes and not 2nd May, 1944 which was the date when the State Government for the first time called upon the Municipality to prepare and publish a draft scheme under the Act. Ultimately, the arbitrator was of the view that no improvements in the area were effected by the Municipality after the scheme was finally sanctioned by the State Government, under section 14, clause (6) of the Act and held that none of the properties inside the scheme area were liable for betterment contribution and, therefore, dismissed the claims. As against this the Municipality appealed under section 29 (1) of the Act.

2. The learned District Judge found that it is not open to the landowners inside the scheme area to question the validity of the scheme or the due process adopted for its making, as it is conclusive in law. He also held that the date on which the market value of the properties should be fixed under section 12 of the Act was 2nd May, 1944 and not 13th June, 1956. After finding that the properties inside the scheme area did have a benefit by reason of the making of the scheme, the appellate authoritity set aside the award of the arbitrator ; but on the ground that there was no sufficient materials before him to estimate the market value of the properties as on the date of notification under section 12 of the Act he caused a remand of the subject-matter to the file of the arbitrator and made an observation that the Municipality should be directed to move the appropriate authority for the appointment of a fresh arbitrator for the purpose. It is as against this award of the appellate authority (the District Judge, East Thanjavur) that the present writ petitions have been filed.

3. The case of the Government and the Municipality who were obviously sailing together, is that the scheme having been sanctioned by the State Government in accordance with the provisions of the Act and the means adopted for such sanction were quite in accord with the prescribed mandates under the statute, this Court cannot at this stage and not even the appellate Court or the arbitrator, could go into the propriety or the means or process adopted by the Municipality or the State Government in the matter of the submissions or ultimate sanction of the town planning scheme, under the Act. They would hesitantly state that the relevant date for fixing the market value of the properties under section 12 of the Act should be 2nd May, 1944 and not 13th June, 1956 which is normally understood as the date of notification under section 12 whereby the Municipality has been directed to publish a draft scheme for the sanction of the State Government.

4. Elaborate contentions were raised and I shall deal with them seriatim. The competency, regularity, propriety and legality of the claims for betterment contribution made by the Mayuram Municipality against the owners of the properties inside the periphery of the Pattamangalam Extension Town Planning Scheme, Mayuram, submitted by the Municipality and sanctioned ultimately by the State Government under the provisions of the Madras Town Planning Act is the subject matter in these writ petitions. For proper appreciation of the contentions, the relevant sections of the Act and the provisions of the scheme may be looked into. Under section 9, it is open to the Municipal Council which includes the City Corporation to prepare a town planning scheme in respect of any land within the Municipal area or in its vicinity outside such area, a draft scheme showing the development proposed in the area. Such a resolution is subject to the final acceptance by the State Government. In the alternative it is open to the State

Government under section 12 to call upon the Municipality in a certain set of cases or circumstances to submit for their sanction a draft scheme as respects any land in regard to which a town planning scheme may be made. Such a draft scheme either emanating at the instance of the Municipality or at the mandate of the State Government shall contain particulars prescribed in section 13 of the Act. The draft scheme is duly published as provided for in that section and it is open to the public who is affected by any of the term or terms of the draft scheme to object to its final approval by the State Government. This is provided for in section 14 (1) of the Act. Ultimately, under section 14 (3), the State Government may sanction the scheme with or without modifications or refuse to sanction the scheme as the case may be. On certain occasions the State Government may send back the scheme for re-consideration to the respective Municipalities, if in their opinion, such a reconsideration was necessary. Ultimately, the State Government sanctions the scheme under section 14, clause (5) and such a sanction shall be published by notification in the gazette and the scheme thereafter is open to inspection by the public. Sub-section 6 of section 14 of the Act says that a notification published under sub-section (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. After the sanctioning of the scheme, the State Government has the right at any time to vary the same or revoke it by a subsequent scheme duly published and sanctioned in accordance with the Act. The proviso to section 15 (1) contemplates the case where the municipal council could modify the scheme by an agreement entered into with the persons interested in the scheme and with the concurrence of the S ate Government. But under section 15 (2) it is made clear that a power to vary or revoke the sanctioned scheme in so far as the State Government is concerned, is not in any way fettered in time or otherwise. Thereafter under section 23 of the Act, if a scheme provides for the laying of claims for betterment contribution, then the Municipality can make a claim for the purpose and within the time limited by the scheme and shall be entitled to recover from the owner of the property within the town planning area an annual betterment contribution for such term of years and at such uniform percentage of the increase in value not exceeding ten per cent as may be fixed in the scheme. There is a proviso to the section fixing the maximum amount of contribution which could be claimed under this head. The principles governing the claim for the betterment contribution are in section 23 of the Act and an arbitrator is appointed under section 27 of the Act by the State Government to entertain such claims and to determine them as already referred to by me. The arbitrator's award is subject to appeal. Under section 29, the District Judge concerned in cases arising outside the City of Madras and the Chief Judge, Court of Small Causes, Madras, in cases arising in the City of Madras, are designated as the statutory authorities for dealing with the appeals. I have already referred to the scheme, Pattamangalam Extension Town-Planning Scheme. The provisions therein are duly indicative of the process by which the properties inside the town planning scheme could be developed. Several yard-sticks for uniform development are provided therein besides certain amenities which the area as such were not enjoying prior to the induction of the scheme into the area. On the basis of such a making of the scheme as detailed in the twon planning scheme in question, claims for betterment contribution are made under clause 22 therein. I have also referred to this in the opening of the case. Now, I shall take up the broad contentions of the parties, and deal with them.

5. The scheme of the Act is reflective of the legislative purpose. It is intended to achieve economic and social planning and further orderly conjoint and co-ordinated development of an ill-developed or under-developed or a developing township or area. The purpose of the Act is to project a mini-master-plan for the prescribed areas in a municipality or a Corporation and involuntarily develop the properties within the boundaries of a sanctioned scheme partly with the help of the owners and residents inside the scheme area. The expenses to develop the scheme area are estimated and the estimate is budgeted

for. One such budgeted item of income as per the scheme itself is the amount realisable from private persons by way of betterment contribution. The betterment contribution therefore, is a contribution or a levy made on the owners of the properties in the scheme for the common purpose of economic and social development of the inside and outside area. By reason of such a making of the scheme, the market value of the property within the scheme is bound to increase or in any event, there is a likelihood of its increase. It is from this unearned increment in the market value of the properties, a claim is raised by the Municipality for betterment contribution in accordance with the various percentages prescribed in the scheme itself, as provided for in the Act. The competency of the said Legislature to enact such an act is beyond dispute. As a matter of fact under items 5 and 6 of list 2 of the VII Schedule to the Constitution, the State has the power to legislate on matters relating to the administration and improvement of a Corporation or Municipality. The Madras Town Planning Act is undoubtedly one such legislation. This Act can also be justified as a piece of legislation which is well within the competence of the State Legislature as economic and social planning is one of the items in list 3 (concurrent list) of the VII schedule which undoubtedly enables all the State Legislatures to take up measures involving such advancement in the interests of the society at large. Mr. Vedantachari says that the betterment contribution is like a tax on income or wealth which is again beyond the power of the State Legislature. When the reality of the situation is borne in mind, the claim for betterment contribution is nothing more than a sanctioned legal exaction in lieu of works, improvements and planning done to a specified area, known as the Town Planning scheme area which, under the Act, is not intended to be done gratuitously. To subserve public interest and achieve a common purpose, the scheme is ushered in, sometimes at the instance of the Municipality concerned and at other times at the mandate of the State Government. The scheme obviously has to be financed. To recoup the expenses which has to be spent for all the improvements contemplated under the scheme, a right is given to the Municipality to demand contribution for such a public cause from the owners of properties inside the scheme. The betterment contribution effectually is to reimburse the Corporation or the Municipality towards the expenses which obviously it has to incur in the making of the scheme. Subba Rao, J., as he then was in *Chengalvaroya Chetti* v. *Special Deputy Collector*[1], held that a notification published under sub-section (5) is conclusive evidence that the scheme has been duly made and sanctioned. The foundational concept of the levy is not a fee or a tax as it is ordinarily understood. It is not a fee because it is not periodical nor is it referable to any periodical services to be rendered by the Corporation or the Municipality to the property owners. It is not a tax because all the citizens are not called upon to suffer the charge. It is a peculiar demand veiled in social economy and characterised by practical development. It is a contribution for a common purpose demanded by a statutory agency created under the Act. I have already justified the demand on the ground that it is in any event a demand arising from legislative mandate and which legislation has to be sustained at any rate under the concurrent list—item 20 therein. The Supreme Court in *Maneklal Chottalal* v. *M. G. Makwana*[2], had occasion to consider the vires of a similar enactment of the State of Bombay. The Supreme Court sustained the Bombay Town Planning Act, 1954 on the ground that it is an enactment which the State Government could undertake under entry 20 of list 3. Again the Supreme Court, while discountenancing the contention that the betterment contribution is neither a tax nor a fee, said:

> "The amount that the petitioners have been asked to contribute is only towards the cost of the Scheme, which has to be incurred by the local authority. As to how exactly the contribution is to be worked out and the proportion in which the plots are to bear that

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1. (1952) 2 M.L.J. 863 : A.I.R. 1953 Mad. 348.
2. (1968) 1 S.C.J. 379 : (1967) 3 S.C.R. 65 : A.I.R. 1967 S.C. 1373.

burden, have all been indicated in the Act. Therefore, the liability of the petitioners to pay *contribution* has to be upheld once we come to the conclusion that the act, as a whole, will have to be sustained".

6. The next contention of Mr. Vedantachari is that the Government has no power to grant time to the Municipality, from time to time, to enable it to submit a draft town planning scheme for their ultimate sanction. The argument is that once a date is fixed for the submission of a scheme and if it is not so submitted neither the Municipality can ask for further time nor the Government has the power to extend the time. Section 12 of the Act vests in the Government an original power which is incapable of exhaustion. The sanctioning authority is the Government; the agency to provide material for such sanction is the Municipality. The Municipality does provide the hypothesis at the behest of the Government under section 12 of the Act. The primary mover of the process is the Government. As the Government is vested with the ultimate power to sanction draft schemes and equally call upon the Municipality to submit draft schemes, no question of extinguishment of such a power arises at any time. Every time the Government extends the time for the Municipality to submit a draft scheme, it literally means, they call upon the Municipality to place before them a scheme for the purpose of scrutiny and sanction. Whether the Municipality seeks for extension within or without the time limit fixed by the Government in their call for submission of a draft scheme, will not make any difference because on each occasion, when the Government acts and extends the time, they act as original authorities and by necessary implication call upon the Municipality to submit a draft town planning scheme under section 12 for their sanction. In *Radhakrishna Chettiar* v. *State of Madras*[1], Rajagopala Ayyangar, J., held that the State Government have the competence to exercise power in them under section 12 from time to time and this is so under section 13 of the General Clauses Act. After referring to section 13 of the General Clauses Act, the learned Judge held:

> "If under section 13, there is a power to require a council to submit a scheme before a date and the State Government have a right to fix any date they considered proper, in my judgment they have a power to alter that date. The theory that when once a date had been fixed, their power becomes exhausted does not appeal to me as sound".

In *Chengalvaroya Chetty* v. *State of Madras*[1], a Bench of our High Court took a similar view and held that it is no doubt true that the State Government has the power to extend by notification the time originally fixed under section 12 of the Madras Town Planning Act for purposes of land acquisition as this is only a simpler form of issuing fresh notification which power they undoubtedly possess and if the Government resorts to any extension of the time originally fixed, then the market value of the property sought to be acquired has to be decided for purposes of ascertaining the compensation as on the date of the last order of extension and not the date originally fixed. The decision of the Division Bench is an answer to the contention of the learned Government Pleader and the counsel for the Municipality as to what ought to be the date which has to be adopted for the purpose of evaluation of the market value of the properties for reckoning the betterment contribution payable. That the date which has to be adopted in the instant case is 13th June, 1956, cannot be disputed at all. The Division Bench has also expressed a similar view. I have also to add that the Government, while extending the time for the submission of a draft town planning scheme exercises its original power and if the situation is viewed in that light, then every such occasion should be understood as a due exercise of power by the Government under section 12 of the Act. Thus understood the last date of the order under which the Government extended the time for the preparation and submission of the scheme by the Municipality should be the relevant date for all pur-

1. (1956) 2 M.L.J. 279 : I.L.R. (1958) Mad. 95.

1. (1958) 1 M.L.J. 253.

poses including the date for the fixation of the market value of the properties for claiming betterment contribution under section 23 of the Act read with clause 22 of the Scheme.

7. The next argument is settled by a decision of our High Court. It is against the competence of the State Government to amend, and vary a scheme after it has been sanctioned under section 14 clause (5) of the Act. The argument is that under clause 22 as it is originally understood, a time limit of two years was provided for, for making a claim for betterment contribution which time limit has been extended to four years by an amendment of the Scheme. The regularity or the propriety of such an amendment is questioned. When a similar question came up before Beach, C.J., in *Ranganathan* v. *Krishnayya*[1], speaking for the Bench, held that the Provincial Government (as it was then called) had the power to extend the period in which the betterment contribution could be claimed as it is expressly provided for in section 15 (2) of the Act. The power of the State Government to vary or revoke is entirely unrestricted except that before acting it shall give the persons affected an opportunity of preferring objections. Ultimately, the Court held that at any stage the Provincial Government had power to amend the scheme by enlarging the time for submission of claims for contribution.

8. The next contention is, whether the totality of the increase in the market value of the properties inside the town planning area is attributable to the town planning scheme and the projects contemplated therein. In other words, if there is an increase in the market value of the properties inside the town planing scheme, can it be said, it is invariably due to the scheme. In may be due to the scheme and other surrounding circumstances such as inflation, general rise in prices etc. So, it is contended that no part of the increase in the price, is relatable to the making of a town planning scheme; it may be that the general influence of the economic factors set out above might have an impact on the market value of the properties. But by the making of the scheme by providing several amenities inside the scheme area such as roads providing easy access to the neighbourhood, play grounds, parks etc., the market value is likely to increase, if not, bound to increase by reason thereof. It is this phenomenon, which was borne in mind, by the Legislature, when it provided for a claim for betterment contribution and fix a definite percentage of such unearned increment as the contribution to be paid by all the property owners inside the scheme area benefited by such amenities provided under the scheme. As a matter of fact our High Court in *Balakrishna Mehta* v. *Corporation of Madras*[1] observed.

> "The underlying implication of the provision in this regard found in section 24 is that any increase in value subsequent to the making of the scheme is attributable to the scheme and on that basis the levy of betterment contribution is provided. There is to our minds what amounts to a statutory declaration that such an increase is due to the making of a scheme and that being so provided by the Legislature, it seems to us that it is not open to a party to claim that any part of the increase is attributable to reasons other than the making of the scheme. If any citizen is aggrieved with such a statutory declaration, unless he could attack it on constitutional grounds, his remedy does not lie in the Courts but elsewhere".

The learned Counsel for the petitioners were unable to prompt me to say that the legislation in question anyway offends the provisions of the Constitution. Therefore, the declaration contained in the scheme resulting in the call for the payment of betterment contribution has to be sustained.

9. The final argument of the learned Counsel for the petitioners is that the appellate authority, should not only find that the properties are liable for betterment contribution but is obliged under section 27 of the Act to reckon the market value on the date of the notification under section 12 of the properties within the

1. I.L.R. (1947) Mad. 113 : (1946) 1 M.L.J. 255 : A.I.R. 1946 Mad. 504.

1. (1962) 1 M.L.J. 92 at 104: I.L.R. (1962(Mad. 137: A.I.R. 1962 Mad. 7 (F.B.).

scheme area. The appellate authority did, no doubt, find that by reason of the making of the scheme, the properties inside the scheme area are liable for contribution. But after having expressed that the properties are so liable, he found as a fact that there were no materials before him to find the market value of the properties as on 2nd May, 1944 and for that purpose he remanded the subject-matter in the manner already expressed. The argument is that as the appellate authority is a *persona designata* he has no power of remand at all. That it is so, is settled by a decision of Subba Rao, J., in *Municipal Council, Nellore* v. *Veerabhadra Rao*[1]. Considering the very same provisions and in particular section 29 of the Madras Town Planning Act, the learned Judge held that the District Judge while dealing with the appeals as against the awards of the Arbitrators under section 27 of the Act, is a *persona designata* and not a civil Court and, therefore, he has no inherent power to remand the matter to the arbitrator. I respectfully agree with this view. It, therefore, follows that in so far as the order of remit contained in the order challenged is concerned, it poses an error apparent, for, the learned District Judge as the appellate authority, had no jurisdiction to remand the same.

10. Whilst, therefore, making the *rule nisi* partly absolute and allowing the writ petitions in part, I make it clear that the findings of the appellate authority in all other respects are confirmed and the subject-matter is remitted back to the file of the District Judge, East Thanjavur, as an appellate authority under section 29 of the Act to record, the market value of the properties within the town planning scheme in question as on the date of notification under section 12 and in accordance with the provisions of clause (*a*) of section 24 of the Act. The appellate authority shall bear in mind that the relevant date for the purpose of such evaluation is 13th June, 1956. The parties are at liberty to adduce such evidence as they deem fit on the aspect which is still to be decided and which has to be disposed of in the light of this judgment by the appellate authority. There will be no order as to costs in all the petitions.

S.J. ——— *Petitions allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail and S. Natarajan, JJ.*

M/s. Maxhemeijer Jr. (India) Private Limited, Pallavaram, represented by its Managing Director Major S. A. Hakeem .. *Appellant**

v.

Zainub Bi, daughter of late Haji M. S. Mohamed Ibrahim Sahib, residing at No. 56, Moore Street, Madras-1 and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *section* 53—*Suit to set aside sale as collusive and fraudulent—Suit by creditor—Not on behalf of all creditors—If sustainable—Civil Procedure Code, Order* 1, *rule* 8—*Non-mention of section impleading—If fatal—Intention to defeat and delay creditors—Allegations necessary—Setting aside alienation—If necessary.*

Without reference to any decided cases simply as a matter of construction of section 53 of the Transfer of Property Act itself, the following characteristic features of the section can be noticed:

1. The suit contemplated by the section must be one instituted by a creditor of the transferor of the property.

2. The transfer of the immovable property should have been made with intent to defeat or delay the creditors of the transferor.

3. The plaintiff in the suit must be one of the creditors so defeated or delayed.

4. The suit instituted by a creditor under this section to avoid a transfer on the ground mentioned in the section shall be instituted on behalf of or for the benefit of all the creditors.

5. The provisions of this sub-section shall not impair the rights of a transferee in good faith and for consideration.

[*Para.* 3.]

1. 1956 An.W.R. 1158 : (1956) An.L.T. 774.

*Appeal No. 390 of 1967. 26*th July*, 1973.

The section uses the words, "to defeat or delay the creditors" and not "to defeat or delay the creditor". Consequently, in a suit instituted under section 53 of the Act, the plaintiff must plead and prove that the impugned transfer was effected with the intention to defeat or delay the creditors of the transferor generally and not to defeat or delay this particular creditor or that particular creditor.

[*Para.* 3.]

The test, therefore, to see whether a particular transfer falls within the scope of the section or not is whether the debtor intended to prejudice the creditors as a whole by parting with his property without consideration or by securing or reserving a benefit to himself.

[*Para.* 3.]

The non-mention of the section cannot be fatal to the suit being within the scope of section 53 of the Act, provided the ingredients of section 53 are otherwise satisfied.

[*Para.* 4.]

The intent to defeat or delay the creditors of the transferor being the most essential requirement of the section, so long as such a plea was not put forward, the suit cannot be considered to be one coming within the scope of section 53 of the Act. [*Para.* 4.]

As a matter of fact, no plaintiff who comes to Court with a suit under section 53 of the Act, can assert that apart from him or her, there are no other creditors of the transferor. All that a plaintiff can say in such circumstances is that to the best of his or her information and knowledge there are no other creditors. That does not absolve a plaintiff from the obligation of instituting the suit in a representative capacity so that other creditors of the transferor, if any, will be benefited by the suit and from seeking the permission of the Court under Order 1, rule 8, Code of Civil Procedure. If this requirement is not satisfied, the suit is liable to be dismissed summarily. [*Para.* 5.]

A suit coming within the scope of section 53 of the Transfer of Property Act need not pray for setting aside the sale deeds, because the plaintiff was not a party to such sale deeds. [*Para.* 9.]

Cases referred to:—

Umar Sait and others v. *Union of India and another*, I.L.R. (1965) 2 Mad. 250: (1965) 1 M.L.J. 59 : (1965) 1 I.T.J. 71 : A.I.R. 1965 Mad. 395 ; *Md. Ishaq* v. *Md. Yusuf*, A.I.R. 1927 Lah. 420 ; *Thaher Unnissa Begum* v. *Sherfunnissa Begum*, (1955) M.W.N. 283 : A.I.R. 1955 Mad. 446 ; *Rajeswari and Co, and others* v. *The Union of India and another*, A.I.R. 1973 Mad. 222; *Bhaskara Chalamiah (died) Piler Khasim Saheb and others* v. *The Body of Creditors of Pil'r Khasim Saheb, represented by Pilerriah Saheb*, (1965) 1 An.W.R. 23 : A.I.R. 1965 A.P. 68 ; *Mohideen Tharagan and another* v. *Muhammad Mustappah Rowther and others*, A.I.R. 1930 Mad. 665; *Madina Bibi Sahiba* v. *Ismail Durga Association and another*, I.L.R. (1940) Mad. 808 : (1940) 1 M.L.J. 872 : A.I.R. 1940 Mad. 789 ; *Seth Nandaramdas Atmaram by agent Hemrajmul and on behalf of all other creditors* v. *Zullika Bibi and others*, I.L.R. (1944) Mad. 133: (1943) 2 M.L.J. 1 : A.I.R. 1943 Mad. 531 ; *Vellayya Konar and another* v. *Ramaswami Konar and another*, I.L.R. (1940) Mad. 73 : (1939) 2 M.L.J. 400 : A.I.R. 1939 Mad. 894.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Chingleput dated 31st March, 1967 in Original Suit No. 107 of 1965.

Habibullah Badsha and *E. S. Govindan*, for Appellant.

S. K. Ahmed Meeran, Abdul Haji and *Mohamed Sayeed*, for Respondents.

The Judgment of the Court was delivered by

Ismail, J.—The first defendant in O.S. No. 107 of 1965 on the file of the Court of the Subordinate Judge, Chingleput, is the appellant herein. Admittedly the suit property of an extent of 3.06 acres belonged to the partnership by name Haji M. Shaik Abdul Kader, M. S. Abdul Rahiman and Company, consisting of two partners Haji M. S. Abdul Rahiman Sahib and Haji M. S. Adam Mohideen Sahib. Haji M. S. Abdul Rahiman Sahib died on 30th April, 1958 leaving behind defendants 2 to 7 as his heirs and legal representatives. Haji M. S. Adam Mohideen Sahib died on 12th March, 1955 leaving behind defendants 8 to 13 and one Habibma, who is not a party

to these proceedings, as heirs and legal representatives. The first respondent herein claiming to have entrusted her jewels and liquid cash with the said partnership took proceedings for recovery of the same from defendants 2 to 13 herein out of the assets of the partnership in their hands. She filed a petition O.P. No. 295 of 1958, on the file of the City Civil Court, Madras represented by her son and next friend, as she was of unsound mind then. The said O.P. prayed for permission of the Court to institute a suit *in forma pauperis*. Subsequently it was transferred to this Court and numbered as C. S. No. 119 of 1960. Pending that suit, the first respondent obtained on 11th July, 1961 an order of attachment of the suit property as well as another item of property in Application No. 1104 of 1961. However, it is admitted that the attachment was not effected. A decree in favour of the first respondent was passed by this Court for a sum of Rs. 29,130 on 24th November, 1961. Meanwhile, under Exhibit B-18 dated 5th June, 1961 the appellant herein entered into an agreement with defendants 2 to 13 for the purchase of the suit property for a consideration of Rs. 40,000. One of the debts for the discharge of which the suit property was agreed to be sold by defendants 2 to 13 was a debt in favour of the Eastern Bank Limited, Madras, and this fact was mentioned in Exhibit B-18 itself, even though the amount due to the Eastern Bank was not actually specified. Under the original of Exhibit B-19 dated 7th July, 1961, the appellant herein obtained an assignment of the decree in favour of the Eastern Bank Limited, for a consideration of Rs. 10,243-73. Thereafter, the appellant purchased the suit property under two sale-deeds, the originals of Exhibit B-2 dated 10th August, 1961 executed by defendants 3 to 13 and Exhibit B-3 dated 12th January, 1962 executed by the second defendant. With regard to the share of Habibma, the appellant executed the decree in favour of the Eastern Bank Limited, Madras, assigned in its favour under the original of Exhibit B-19, and purchased her share in the suit property, in Court-auction. Nearly three years after these sales, the present suit was instituted by the first respondent herein for the following reliefs:

"(*b*) declaration that the sale-deed dated 10th August, 1961 and 13th January, 1962 (mistake for 12th January, 1962) executed by defendants 2 to 13 in favour of 1st defendant is invalid and inoperative and not binding on the plaintiff;

(*c*) for setting aside the sale-deed dated 10th August, 1961 and 13th January, 1962 (mistake for 12th January, 1962) executed by defendants 2 to 13 in favour of the 1st defendant in respect of 'B' schedule;

(*d*) for an injunction restraining the 1st defendant from demolishing or constructing on the suit property".

Subsequently, the plaint was amended by inclusion of the following prayer:

"(*c*) (1) or in the alternative for a decree for Rs. 39,760 as on 7th August, 1964 against the first defendant with 6 per cent. interest in satisfaction of the decree in C.S. No. 119 of 1960 on the file of the High Court, Madras".

In the plaint, the first respondent had contended that the sale of the suit property by defendants 2 to 13 in favour of the appellant herein was a collusive and fraudulent transaction entered into by the parties with the intention of defeating the rights of the first respondent under the decree in C.S. No. 119 of 1960 on the file of this Court. The first respondent had contended that even though the order of attachment of the suit property was not actually effected, the son of the first respondent actually met the Managing Director of the appellant herein and informed him of the existence of the order of attachment and warned him against the purchase of the property. It is on the basis of these allegations, the suit was instituted for the reliefs referred to above. The appellant herein filed a written statement contending that it had purchased the property *bona fide* and there was absolutely no collusion between the appellant and defendants 2 to 13. The appellant denied that the Managing Director of the appellant was informed of the existence of the order of attachment passed by this Court and notwithstanding the knowledge of that order and the warning given, he purchased the property in collusion with

defendants 2 to 13. Except the 12th defendant, the other defendants remained *ex parte* and the 12th defendant filed a written statement denying the allegations contained in the plaint. On the basis of these pleadings, the learned Principal Subordinate Judge framed the following issues:

(1) Was the first defendant not aware of the suit C.S. Nos. 119 of 1960 and the attachment application No. 1104 of 1961, High Court, Madras in respect of the suit property prior to its purchase of the suit property?

(2) Have the defendants 2 to 13 colluded with the first defendant to deprive the plaintiff of the fruits of her decree?

(3) Has the first defendant pushed through the purchase of the suit property with a view to obtain unfair advantage to itself and thereby colluded and helped the defendants 2 to 13 to defraud the plaintiff?

(4) Is the suit barred by limitation?

(5) To what relief, if any, is the plaintiff entitled?

On 5th November, 1966, three additional issue were framed, presumably after the amendment of the plaint, and they are as follows:

(1) Is the plaintiff entitled to damages against the first defendant?

(2) Is the claim of the plaintiff maintainable?

(3) Is the claim made by the plaintiff barred by limitation?

In the course of his judgment, the learned Principal Subordinate Judge recast issue No. 1 on the ground that the issue originally cast threw the burden on the first defendant, while the burden should be really on the plaintiff, and the issue so recast is as follows:

Issue No. 1 : was the first defendant aware of the suit C.S. No. 119 of 1960 and the attachment application No. 1104 of 1961, High Court, Madras, in respect of the suit property prior to its purchase of the suit property?

2. The learned Principal Subordinate Judge, on a consideration of the materials placed before him, held on the principal issues against the appellant herein. With regard to issue No. 1, his finding was that the first defendant was aware of the suit, C. S. No. 119 of 1960 and the attachment application No. 1104 of 1961 in respect of the suit property prior to its purchase. His answers to issues Nos. 2 and 3 were in the affirmative. On issue No. 4 he held that the suit was not barred by limitation. On additional issue No. 1, he did not go into details, in view of his conclusion that the first respondent was entitled to have the sales under the originals of Exhibits B-2 and B-3 declared void and inoperative and not binding on her. However, he held that if she were to fail in her main prayer for setting aside the two sales referred to above, she will be entitled to damages as against the appellant on his finding that the appellant's Managing Director D.W. 1, had colluded with defendants 2 to 13 and had caused loss to the first respondent, depriving her of the fruits of her decree in C. S. No. 119 of 1960 by purchasing the suit property for a low price on account of such collusion and fraud. With regard to additional issue No. 2, the finding of the learned Principal Subordinate Judge was that the alternative claim for damages was maintainable. On additional issue No. 3, the finding was that the suit was not barred by limitation and as a matter of fact that question was not argued by the Counsel for the contesting defendants before him. In view of these findings, by his judgment and decree dated 31st March, 1967, the learned Principal Subordinate Judge decreed the suit with costs, granting a declaration that the sale deeds dated 10th August, 1961 and 12th January, 1962, were invalid and inoperative as against the plaintiff (first respondent) and setting aside the said sales. However, he dismissed the prayer for an injunction against the appellant herein. It is against this judgment and decree that the first defendant in the suit has preferred the present appeal.

3. The principal question for consideration is, whether the suit instituted by the first respondent herein is a suit coming within the scope of section 53 of the Transfer of Property Act, hereinafter referred to as the Act. It is fairly conceded that the first respondent can

succeed in her prayer with regard to the suit property sold under the originals of Exhibits B-2 and B-3 only if the suit comes within the scope of section 53 of the Act. That section so far as is relevant for the purpose of this case is as follows:

> "*Section* 53 (1)—Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors".

Without reference to any decided cases, simply as a matter of construction of the section itself, the following characteristic features of the section can be noticed:

1. The suit contemplated by the section must be one instituted by a creditor of the transferor of the property.

2. The transfer of the immovable property should have been made with intent to defeat or delay the creditors of the transferor.

3. The plaintiff in the suit must be one of the creditors so defeated or delayed.

4. The suit instituted by a creditor under this section to avoid a transfer on the ground mentioned in the section shall be instituted on behalf of or for the benefit of all the creditors.

5. The provisions of this sub-section shall not impair the rights of a transferee in good faith and for consideration.

We are not referring to the provisions of the section regarding the law of insolvency, since that has no relevancy to the facts of the present case. One other feature of this section is that a transfer as such is not prohibited and is not void and it is merely rendered voidable at the option of the creditors who were sought to be defeated or delayed by the transferor. As a matter of fact, a transfer as between the transferor and the transferee will be binding and neither of the parties can put forward a contention that the transfer is hit by section 53 of the Act and it is only a defeated or delayed creditor who can put forward the said contention under the provisions of that section. Consequently, for the section to be applied, the plaintiff must necessarily institute the suit in a representative capacity, because the fourth paragraph of the sub-section clearly provides for the said requirement. Apart from this, the basis and gist of the action under this section is the intention on the part of the transferor to defeat or delay the creditors at the time when the transfer was effected. It should be noticed that the section uses the words, "to defeat or delay the creditors" and not "to defeat or delay the creditor". Consequently, in a suit instituted under section 53 of the Act, the plaintiff must plead and prove that the transfer which is impugned by the plaintiff was effected with the intention to defeat or delay the creditors of the transferor generally and not to defeat or delay this particular creditor or that particular creditor. The fraud, for the purpose of this section consists of the intention to defeat or delay the creditors of the transferors. An intent to defeat or delay the creditors as a whole in the enforcement of this right is what is regarded as a fraudulent intent under this section. This requirement of the section is easily understandable, because the normal rule is, any person is entitled to deal with his property in any way he pleases and the restriction imposed on the said power of alienation is only by way of equity in favour of other persons and one such equity is that which is recognised in favour of the creditors of the transferor. The right of the creditors, taken as whole, is that the entire assets of the debtor should be applied in payment of demands of them or some of them, without any portion of it being

parted with, without consideration or reserved or retained by the debtor to their prejudice. The test, therefore, to see whether a particular transfer falls within the scope of the section or not is whether the debtor intended to prejudice the creditors as a whole by parting with his property without consideration or by securing or reserving a benefit to himself.

4. Having regard to this background of the statutory provisions and requirements let us now consider whether the plaint, in the present case comes within the scope of section 53 of the Act or not. In the first place, it is admitted that the plaint does not refer to section 53 of the Act at all. We are of the opinion that the non-mention of that section cannot be fatal to the suit being within the scope of section 53 of the Act, provided the ingredients of section 53 are otherwise satisfied. Equally in the plaint, the language of section 53 has not been referred to either expressly or by necessary implication. Thirdly, admittedly the suit has not been instituted in a representative capacity on behalf of the creditors of defendants 2 to 13 and the permission of the Court under Order 1, rule 8, Code of Civil Procedure, has not been obtained. Therefore, we shall refer to the allegations in the plaint to find out, what exactly was the case of the first respondent in her plaint. After referring to the facts as to her filing a suit, getting an order of attachment passed by this Court on 11th July, 1961 and also obtaining a decree on 24th November, 1961 in C.S. No. 119 of 1960 on the file of this Court, she states in paragraph 2 of the plaint that defendants 2 to 13 with a view to defraud the plaintiff of the fruits of the decree in her favour colluded with the first defendant (appellant herein) to dispose of the suit property to the first defendant (appellant herein). In the same paragraph she again states: "Defendants 2 to 13 are evilly disposed towards the plaintiff and bear a grudge and indignation against the plaintiff and have been manoeuvering and manipulating ways and means to deprive the plaintiff of her rightful claim and in pursuance of the said objective have sold the property to the 1st defendant herein in spite of attachment."

In paragraph 3 she states:

"The plaintiff charges the defendants with collusion and fraud and with a view to defeat the claim of the plaintiff the defendants have colluded and have brought about the sale of the suit property."

Thus, the plaint proceeds solely on the basis of defendants 2 to 13 and the appellant having colluded to deprive the plaintiff of the fruits of her decree in C.S. No. 119 of 1960 on the file of this Court. There is absolutely no averment or allegation anywhere in the plaint that the transfers under the originals of Exhibits B-2 and B-3 were effected with the intention on the part of defendants 2 to 13 to defeat or delay their creditors generally. As a matter of fact, the issues framed by the trial Court, which we have extracted, will clearly reflect the allegations and the case of the parties. It will be seen that there is not a single issue to the effect whether the transfers under the originals of Exhibits B-2 and B-3 were effected by defendants 2 to 13 with the intention of defeating or delaying the creditors of the transferors. Consequently, it must be held that the entire plaint proceeds on the allegation that the transfers under the originals of Exhibits B-2 and B-3 were intended to defeat the rights of the first respondent under the decree in C.S. No. 119 of 1960 on the file of this Court and there is absolutely no whisper about the said transfers having been effected with intent to defeat or delay the rights of the creditors of the transferors generally. Mr. S.K. Ahmed Meeran, learned Counsel for the first respondent, contended that when the first respondent happens to be the only creditor, it is not necessary for the first respondent to aver that the intention of the transferors in effecting the transfers under the originals of Exhibits B-2 and B-3 was to defeat or delay the rights of the creditors. We are unable to accept this argument. Whenever a plaintiff comes to Court with a suit under section 53 of the Act, that plaintiff will have to allege and prove for succeeding in the suit that the transfer impugned by the plaintiff was effected with the intent to defeat or delay the creditors of the transferor. As a matter of fact, the legal position is that even if the transferor had no creditor on the date of the transfer, but if he had intended to defeat or delay the future

creditors, the section will be attracted. This position has been considered by a Bench of this Court in *Umar Sait and others* v. *Union of India and another*[1], The Bench extracted the following passage from Halsbury's Laws of England, 3rd Edition, Volume 17 at page 660 :

> "With the above exceptions, all creditors who have been prejudiced by the alienation made with intent to defraud them, whether their debts were owing at the date it was made or were incurred subsequently, may avoid the alienation and share in the distribution of the property comprised therein. Although subsequent creditors have the same right to set aside an alienation made with intent to defraud them as creditors whose debts were due at the date of the alienation, they have a more difficult task than the latter class of creditors in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such a case they must prove either an express intent to defraud creditors, that, immediately after the settlement, the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts. In the absence of an express intent to defraud, a voluntary deed will not be set aside at the instance of a subsequent creditor if all creditors existing at the date of the deed have been paid off."

The Bench further approved the following observation of Tek Chand, J., in *Mohammed Ishaq* v. *Mohammed Yusuf*[2]:

> "But where there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the event of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances the transaction will be presumed to be *bona fide* and it will lie on the future creditors to prove that the transfer was made with an intent to defeat or delay them."

We are referring to these passages in the judgment of this Court merely for the purpose of showing that the section will be attracted even if there are no creditors on the date of the transfer, but the transferor intends to defeat his future creditors by transferring the property in question. Therefore, even assuming that the first respondent herein was the sole creditor of defendants 2 to 13 on the dates when the originals of Exhibits B-2 and B-3 came into existence, it does not absolve the first respondent from pleading and proving that on the dates of Exhibits B-2 and B-3, defendants 2 to 13 intended to defeat or delay their creditors generally and not merely to defeat the rights of the first respondent under the decree in C.S. No. 119 of 1960 on the file of this Court. However, as far as the present case is concerned, there is ample evidence to show that on the dates of Exhibits B-2 and B-3 there were other creditors of defendants 2 to 13. As a matter of fact, P.W. 1, son of the first respondent, in his evidence admitted that he took out execution proceedings against other properties and no amount could be recovered as they had gone away to the South Indian Bank and other creditors. Similarly with regard to certain other moneys deposited in the Court which the first respondent sought to attach in execution of the decree in her favour, P.W. 1 stated that they were taken by the sales tax authorities as well as Income-tax authorities towards the moneys due to them, by the partnership. Therefore, in this case even the evidence let in on behalf of the first respondent clearly establishes that in addition to the first respondent herein, there were other creditors of defendants 2 to 13 at the time when the originals of Exhibits B-2 and B-3 were executed. Consequently, there is absolutely no excuse for the first respondent not pleading in the plaint that the transfers under the originals of Exhibits B-2 and B-3 were intended to defeat or delay the rights of the creditors of the transferors generally, if she wanted to succeed in a suit under section 53 of the Act. The intent to defeat or delay the creditors of the transferor being the most essential requirement of the section, so long as such a plea was not put forward, the suit cannot be considered to be one coming within

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1. I.L.R. (1965) 2 Mad. 250 : (1965) 1 M.L.J. 59 : (1965) 1 I.T.J. 71 : A.I.R. 1965 Mad. 395.
2. A.I.R. 1927 Lah. 420.

the scope of section 53 of the Act. As a matter of fact, all that the first respondent stated in her plaint in paragraph 2 is:

> "The plaintiff reliably understands that she is the only creditor who has been defrauded by the defendants 2 to 13."

In *Thaher Unnissa Begum* v. *Sherfunnissa Begum*[1], this Court held:

> "There was no allegation by this decree-holder that there was a transfer by the husband in favour of this appellant, his wife, 'in order to defeat or delay or to defraud his creditors', and that he was entitled to avoid the transfer on the ground that it had been made with intent to defeat or delay the creditors. Simply because the lower Court observed, in its order, that this patta transfer was made with a view to defeat and delay the present decree-holder, section 53 will not be invoked. It is significant to note that the lower Court itself did not say that the transfer was made with a view to defeat and delay the creditors, but only to defeat and delay the present decree-holder, one creditor of his. Section 53 will apply only when the transfer is made with intent to defeat and delay the creditors of the transferor, and not one single known creditor and that one the executing decree-holder. Here too, I must note that the decree-holder did not mention that there was a transfer by the appellant's husband to her, and that the transfer was made with intent to defeat and delay him, and that he was therefore entitled to avoid it. He simply proceeded against the properties as his judgment-debtor's. So, section 53 cannot possibly come into operation."

We are of the opinion that this passage in the judgment of the learned single Judge of this Court correctly represents the legal position. As a matter of fact, the view of the learned Judge as to the requirements of section 53 as expressed in the above extract was approved by a Bench of this Court to which one of us was a party in *Rajeswari and Company and others* v. *The Union of India and another*[2],

1. (1955) M.W.N. 283 : A.I.R. 1955 Mad. 446.
2. A.I.R. 1973 Mad. 222.

Consequently, we are unable to share the view of a Bench of the High Court of Andhra Pradesh in *Bhaskara Chalamiah* (died) *Piler Khasim Saheb and others* v. *The Body of Creditors of Piler Khasim Saheb, represented by Pilerriah Saheb*[1], that the observations of this Court in *Mohideen Tharagan and another* v. *Muhammad Mustappah Rowther and others*[2], and in *Thaher Unnissa Begum* v. *Sherfunnissa Begum*[3], were merely obiter. Therefore we are clearly of the opinion that the suit in so far as it purports to be one under section 53 of the Act cannot be maintained and it is liable to be dismissed.

5. As far as the representative character of the suit is concerned, Mr. Ahmed Meeran, contended that the first respondent happened to be the only creditor at the time when she instituted the suit and therefore there was no obligation on her part to institute the suit in a representative capacity. We are unable to accept this argument. In the first place, there is no averment in the plaint that on the date of the suit, the first respondent was the sole creditor of defendants 2 to 13. As a matter of fact, no plaintiff, who comes to Court with a suit under section 53 of the Act, can assert that apart from him or her, there are no other creditors of the transferor. All that a plaintiff can say in such circumstances is that to the best of his or her information and knowledge there are no other creditors. That does not absolve a plaintiff from the obligation of instituting the suit in a representative capacity so that other creditors of the transferor, if any, will be benefited by the suit and seeking the permission of the Court under Order 1, rule 8, Code of Civil Procedure. If this requirement is not satisfied, the suit is liable to be dismissed summarily. That was the view taken by a Bench of this Court in *Madina Bibi Sahiba* v. *Ismail Durga Association and another*[4], and another Bench of this Court in *Seth Nandaramdas Atmaram by agent Hemrajmul and on behalf of all other creditors*

1. (1965) 1 An.W.R. 23 : A.I.R. 1965 Andh. Pra. 68.
2. A.I.R. 1930 Mad. 665.
3. (1955) M.W.N. 283 : A.I.R. 1955 Mad. 446.
4. I.L.R. (1940) Mad. 808 : (1940) 1 M.L.J. 872 : A.I.R. 1940 Mad. 789.

v. *Zulika Bibi and others*[1]. It is in view of this alone, when a suit is instituted in a representative capacity, the cause title will have to be in the form of the plaintiff suing on behalf of himself and all other creditors of the transferor and the decree also will have to be in the form of Civil Procedure Code, 1908, Schedule I, Appendix D-13 declaring the transfer void as against the plainiff and all other creditors, if any, of the defendant. In this case admittedly this procedure has not been followed and we have rejected the only, explanation offered by the first respondent and therefore on this ground also the suit is liable to fail.

6. We may mention in this context that even the learned trial Judge did not record any finding anywhere in the course of his judgment that the transfers under the originals of Exhibits B-2 and B-3 were effected with the intention of defeating or delaying the creditors of defendants 2 to 13 generally. In paragraph 9 of his judgment, the learned trial Judge states that the evidence of P.W. 1 was very definite that defendants 2 to 13 were saying that they would see that the plaintiff would not get a pie and that therefore they and Major Hakim, the Managing Director of the first defendant company, who has been examined as D.W. 1, colluded together and defrauded the plaintiff of the fruits of her decree by bringing about the transfer of the suit property under the originals of Exhibits B-2 and B-3. Again in the same paragraph, the learned trial Judge concludes that D.W. 1 had to join hands with defendants 2 to 13, who, though strangers to him were bent upon defrauding the plaintiff of the fruits of her decree in C.S. No. 119 of 1960. In paragraph 10 again he states that the haste with which the transfer under the original of Exhibit B-2 had been effected would also indicate the collusion between the first defendant and defendants 2 to 13 and the fraud on their part to defeat the rights of the plaintiff. Towards the end of that paragraph, he records his finding as follows:—

> "All these circumstances go to indicate the collusion between the first defendant and defendants 2 to 13, the debtors of the plaintiff and the fraud perpetrated by them on the plaintiff by bringing about the impugned sale of the suit property in favour of the first defendant to defeat the rights of the plaintiff's decree."

In paragraph 11 again, he states that all of them joined together and brought about the sale of the suit properties under the originals of Exhibits B-2 and B-3 with a view to defeat and delay the plaintiff's rights under the decree. Consequently, throughout the judgment of the learned trial Judge, the emphasis is the defeating of the rights of the plaintiff under the decree in C.S. No. 119 of 1960 and there is not a whisper in the judgment about there being any intention on the part of defendants 2 to 13 to defeat or delay the creditors generally when executing the originals of Exhibits B-2 and B-3.

7. It is only towards the end of paragraph 11 and in paragraph 12 that the learned trial Judge refers to section 53 of the Act. Even here, the learned trial Judge has not referred to the most essential and important requirement of the section to which we have already drawn attention. The learned trial Judge says in paragraph 12 of his judgment:

> "But under section 53 itself a creditor is given a right to avoid such a fraudulent transfer by filing a suit for the benefit of all creditors. It means that it should be a representative suit on behalf of all the creditors of the vendors. But the suit on hand is filed only by the plaintiff a creditor of the vendors, defendants 2 to 13. But I have to point out that the definite averment in the plaint that the plaintiff is the only creditor, who has been defrauded by the vendors has not been controverted by the first defendant or the 12th defendant in their written statements. Therefore, there is no point in insisting that the plaintiff should have filed a suit in a representative capacity on behalf of all the creditors. Further, equity looks to the spirit and not to the letter of the law. Therefore, even if it is shown that there are other creditors of the vendors, the plaintiff's suit need not fail on that ground of such technicality. Anyhow, I am satisfied that the plaintiff is the only creditor of defendants 2

1. I.L.R. (1944) Mad. 133 : (1943) 2 M.L.J. 1 : A.I.R. 1943 Mad. 531.

> to 13 and the present suit filed by her is maintainable under the provisions of section 53 of the Transfer of Property Act."

For the reasons we have indicated already, the above statement in the judgment of the learned trial Judge is clearly erroneous. It is difficult to understand how the learned trial Judge could have satisfied himself that the plaintiff was the only creditor of defendants 2 to 13 in the absence of such a case put forward by the plaintiff herself either in the plaint or in the evidence. Equally untenable is the stand of the learned trial Judge that equity looks to the spirit and not to the letter of the law and therefore even if there are other creditors of the vendors, the plaintiff's suit need not fail on the ground of such technicality. These observations of ours on the finding of the learned trial Judge are independent of the fact that that the learned trial Judge had never considered the question of intention to defeat or delay the creditors of the transferors, generally.

8. Mr. Ahmed Meeran, then contended that such a point was not taken by the appellant either in the written statement filed before the trial Court or even in the grounds of appeal before this Court and consequently we should not go into this question at the instance of the appellant in this appeal. We are unable to accept this argument. We have already indicated that the plaint itself does not contain any indication that it was one instituted under section 53 of the Act. Only if the plaint was purported to have been instituted under that section, there would be an opportunity for the defendant to put forward a contention that the requirement of that section had not been satisfied. It is only because of this feature, the appellant in its written statement merely pointed out that the suit was not maintainable in the form in which it had been filed by the plaintiff. Apparently during the course of the arguments in the trial Court, section 53 of the Act was relied on and the learned Judge has referred to that section. It is only because of this, in the grounds of appeal before this Court, the appellant put forward a contention that the learned trial Judge has misconstrued the scope of section 53 of the Act.

9. Apart from this, there is another misleading feature in the plaint itself. A suit coming within the scope of section 53 of the Act need not pray for setting aside the sale deeds, because the plaintiff was not a party to such sale deeds. As early as 1939, the question whether a suit coming within the scope of section 53 of the Act should pray for setting aside a transfer or should merely pray for a declaration that the said transfer was not binding on the plaintiff was considered. In *Velloyya Konar and another* v. *Ramaswami Konar and another*[1], Wadsworth, J., had considered this question with reference to the quantum of the court-fee payable for such a suit. The learned Judge held that a suit brought by a creditor under section 53 of the Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document securing money or property, falling under section 7 (iv-A) but a suit to obtain a declaration where no consequential relief is prayed for. The reasoning given by the learned Judge is:

> "There is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. When plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto* and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid

1. I.L.R. (1940) Mad. 73: (1939) 2 M.L.J. 400: A.I.R. 1939 Mad. 894.

> so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed."

It is in view of this only that a suit under section 53 of the Act is one for a bare declaration under section 42 of the Specific Relief Act, 1877 (corresponding to section 34 of the 1963 Act) and not one for cancellation of the document under section 39 of that Act (corresponding to section 31 of the 1963 Act). In this case, as we have pointed out already, the plaint contains a specific prayer for setting aside the sale deeds, dated 10th August, 1961 and 12th January, 1962 in favour of the appellant herein and that can put anybody on a wrong scent with regard to the nature of the suit and the provision of law under which it has been instituted, particularly when the plaint makes no reference whatever to section 53.

10. Under these circumstances, we are clearly of the opinion that the suit instituted by the first respondent herein cannot come within the scope of section 53 of the Act. There being no other provision of law under which the first respondent can seek a declaration that the originals of Exhibits B-2 and B-3, sale deeds are not binding on her, the prayer of the first respondent in this behalf must necessarily fail. As we have pointed out already, the question of the first respondent obtaining a decree setting aside the sale deeds does not arise, because the first respondent herself was not a party to the sale deeds.

11. Since we are holding that the suit does not come within the scope of section 53, it is unnecessary for us to consider the question whether the appellant herein is a transferee in good faith and for consideration or not.

12. Then there remains the alternative relief claimed in the plaint, after the amendment of the plaint, namely, the claim for damages being the amount payable to the plaintiff under the decree in C.S.No. 119 of 1960. This claim has been made only against the first defendant and not against the other defendants. We have already pointed out that the learned trial Judge did not go into the details with regard to this claim, in view of the fact that he has granted the other prayer of the first respondent, but expressed his opinion that the first respondent would be entitled to damages from the appellant herein. We asked Mr. S.K. Ahmed Meeran, learned Counsel for the first respondent, to show what cause of action the first respondent had against the appellant for claiming damages. Certainly it is not a case of damages for breach of contract. Consequently it can be a claim for damages only on the basis of a tortious act on the part of the appellant herein. No such tortious act was brought to our notice and Mr. Ahmed Meeran, frankly expressed his inability to support the claim for damages against the appellant on the basis of any such tortious Act.

13. Under these circumstances, the appeal is allowed and the judgment and decree of the learned Principal Subordinate Judge, dated 31st March, 1967 in O.S. No. 107 of 1965 are set aside and the suit instituted by the first respondent herein will stand dismissed. As we have pointed out already, the suit itself was instituted *in forma pauperis* and since the learned Principal Subordinate Judge has decreed the suit as prayed for, he directed the defendants to pay the Court-fee payable on the plaint. However, since we have held that the suit instituted by the first respondent is liable to be dismissed, the said direction given by the learned Principal Subordinate, Judge will stand vacated. Instead, since we are dismissing the suit, we direct that the Court-fee payable on the plaint shall be paid by the plaintiff-first respondent. There will be no order as to costs both in this Court and in the lower Court.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*Ramaprasada Rao, J.*

S. Saradha and another .. *Petitioner* *

v.

The State of Tamil Nadu represented by the Secretary, Education Department, Madras-9 and others .. *Respondents.*

(A) *Madras City Municipal Corporation Act (IV of* 1919), *section* 87—*Post of Assistant Educational Officer remaining vacant for more than three months—B.T. supervisor promoted temporarily by Council—Not approved by Government—Government acting under section* 87—*Temporary promotee reverted—Another person promoted as Assistant Educational Officer—Action of Government whether valid—Temporary promotee whether aggrieved person—Scope of section* 87—*Whether directory or mantory—Temporary promotee not heard before reversion—Whether principles of natural justice violated—Interpretation of statutes—Constitution of India* (1950), *Article* 226.

Under section 87 of the Madras City Municipal Corporation Act, the Government was exercising power as a superior statutory functionary in the matter of selecting proper personnel to vacancies which have arisen in the establishment. If such subjects which are within their jurisdiction come up for consideration by them either for confirmation or for scrutiny, that could not be a proceeding which was equatable to a *lis*, compelling the scrutinising authority to hear adequately the persons interested in the subject-matter and ultimately decide. [*Para.* 6.]

Normally if a statute prescribed a formal time-limit for the performance of a statutory duty without specifying any consequence in default of compliance with such a mandate, then such a prescription is a directory and not a mandatory prescription. Where the prescription was that a vacancy relating to officers should be filled up within a period of three months by the Council and on default of such appointment by the Council, the State Government could interfere and act on their own and make the appointment, that consequence made it clear that the prescription as to time was not purely directory but was obligatory.

[*Paras.* 8 and 9.]

A post of Assistant Education Officer fell vacant in the Corporation. Long after three months after the post fell vacant, the Council passed a resolution selecting the name of *P* for the post and *P* who was a B.T. Supervisor was appointed temporarily to the post pending approval by the Government. However the Government acting, under section 87 (3) of the City Municipal Corporation Act, appointed another person and reverted *P* from the post of Assistant Educational Officer. Aggrieved by the said order, *P* filed a petition for the issue of a writ challenging the said order.

Held, that *P* was aware that she was appointed temporarily pending approval by the competent authority. '*P*' had therefore no right to the post to enable her to seek for relief under Article 226 of the Constitution. Only where there was an infringement of a vested right a person could be said to be inconvenienced or affected. But when the said right was incomplete and not so vested, then the person who sought for the enforcement of such an inchoate right obtained by her could not be said to be an aggrieved person. [*Para.* 11.]

If the Council failed to appoint a qualified and suitable person to hold the office in case any vacancy occurred in it within three months from the date of the occurrence of such vacancy in accordance with section 87 (1) of the Madras City Municipal Corporation Act, then the residuary power of the State Government to act and appoint a suitable person of their choice was unquestionable as it was automatic. [*Para.* 12.]

It was not imperative that in all cases like the present one that the person whose temporary appointment was going to be disturbed had to be consulted. This was not a *lis* between two parties where

*W.P. Nos. 1459 and 1462 of 1973.
9th August, 1973.

the Government was an adjudicator for deciding the dispute as between them. [*Para.* 19.]

(B) *Madras Municipal Corporation Act* (*IV of* 1919), *section* 87—*Appointment by Council—B.T. Supervisor appointed temporarily as Assistant Educational Officer—Appointment as reliever in leave vacancy—Appointment not within section* 87 (1)—*Interference by Government under section* 87 (3)—*Validity.*

The petitioner was appointed by the Corporation Council as reliever in case of leave vacancies in the post of Assistant Educational Officer in future. The appointment was not squarely within the meaning of section 87 (1) of the Madras Municipal Corporation Act. The vacancy contemplated in section 87 (1) was not an expected or anticipated vacancy but a real vacancy. The petitioner was appointed as substitute for leave or any other vacancy that might arise. The State Government interfered with this decision of the Council as if it was an appointment made under section 87 (1), taking power to act under section 87 (3). The petitioner challenged the validity of the interference by the Government under section 87 (3).

Held, In the circumstances the residuary power under section 87 (2) and (3) was not available to the State Government to set aside such an administrative order of the Council. As the appointment could not be interpreted to be one under section 87 (1), the State Government could not assume power under section 87 (3) to set aside that order. [*Para.* 20.]

Cases referred to :—

Street Railway Co. v. *Normandin*, (1917) A.C. 170; *Rattan Anmol Singh* v. *Ch. Atma Ram*, A.I.R. 1954 S.C. 510: (1955) 1 S.C.R. 481 : 1954 S.C.J. 731 : (1954) 2 M.L.J. 435; *Babu Ram* v. *Smt. Prasanni*, A.I.R. 1959 S.C. 93: (1959) S.C.R. 1403 : 1959 S.C.J. 42; *Guruswamy Reddiar* v. *Secretary, Regional Transport Authority, South Arcot*, W.A. No. 1 of 1973; *Raza Buland Sugar Co. Ltd.*, *Rampur* v. *The Municipal Board, Rampur*, A.I.R. 1965 S.C. 895 : (1965) 1 S.C.R. 970; *Fakir Chunder Dutt* v. *Ram Kumar Chatterjee*, (1904) I.L.R. 31 Cal. 901.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to G.O. No. 168, Education, dated 1st February, 1973 and (1) quash the same in so far as it affects the petitioner in W.P. No. 1459 of 1973; (2) quash the same in W.P. No. 1462 of 1973.

K.K. Venugopal for *P. Chidambaram* and *M. N. Krishnamani*, for Petitioners.

T. Sathiadev, the Assistant Government Pleader, *R. Thillai Villalan*, *S. Nainar Sundaram* and *V. Natarajan*, for Respondents.

The Court made the following

ORDER.—W.P. No. 1462 of 1973.—On 16th January, 1966 the post of Assistant Educational Officer fell vacant consequent upon the promotion of the previous incumbent in office as Educational Officer, Corporation of Madras. The post of Assistant Educational Officer comes under the category of Class II Officers in the establishment. For the first time but long after three months from the date when the post fell vacant a note was put up by the Commissioner, Corporation of Madras, to the Council to select a panel of two names for the purpose and also to indicate the order of preference. It was also suggested that the first candidate would be appointed as Assistant Educational Officer (North) and the second will be appointed in any leave or other vacancy that may arise. The pool from which such officers could be selected consists of Headmasters of the various Corporation Schools and/or B.T. Supervisors. The names of the writ petitioner, 3rd respondent, S. Saradha, writpetitioner in W.P.No. 1459 of 1973, and another were also recommended. It is seen that the subject was also taken up by the Council, Corporation of Madras, long after three months from the date when the post fell vacant. The Council at its meeting held on 27th June, 1967 resolved to select the writ petitioner and S. Saradha in the order of preference indicated for the

posts as suggested by the Commissioner. But both the selections were to be subject to the approval of Government. On 5th July, 1967, the Commissioner issued proceedings as under :

> "In pursuance of the resolution of the Council cited and subject to the conditions mentioned below Thirumathi A. Purna Ramesh, B.A., B.T., Supervisor (Education), South District, is appointed to act as Assistant Educational Officer North), Corporation of Madras. in the scale of pay of Rs. 250—10—300—15—450 plus the usual allowances and a Motor Car Allowance of Rs. 100 per mensem *vice* Thiru O.A. Kanagasabai, B.A., B.T., Assistant Educational Officer (North), promoted as Educational Officer or until further orders.
>
> 1. the appointment is subject to her study of Tamil and qualifying within a period of two years from the date of her appointment by passing the 'Second Class language test in Tamil' held by the Madras Public Service Commission,
>
> 2. the appointment is purely temporary without right of probation and subject to the conditions contained under proviso to section 94 of the Madras City Municipal Corporation Act, 1919 as amended by the Madras Act XV of 1965,
>
> 3. the appointment is subject to approval of the competent authorities."

It was made clear that the appointment was purely temporary without right of probation and subject to approval of the competent authorities. Obviously this appointment was made under section 87 (4) of the Madras City Municipal Corporation Act, hereinafter called the Act. On 14th July, 1967, the Commissioner communicated the resolution of the Council as also his proceedings temporarily appointing the writ petitioner as Class II Officer and requested that the Government may approve of the panel of names and invited the Government's attention to section 85 (3) (*b*) of the Act. In the meantime the writ petitioner took charge as a temporary incumbent to the office. The Government after obtaining certain remarks on the communication sent to them by the Commissioner, Corporation of Madras, on 12th October, 1971, pointed out that as the vacancy was not filled up in accordance with section 87 (1) of the Act, it was irregular. They therefore asked the Commissioner, Corporation of Madras, to send to the Government a panel of names prepared on the basis of seniority and merit of all the persons qualified for the post for them to appoint. They referred to the other provisions of section 87 also. It may be noted that when the Government wrote their memo., dated 12th October, 1971, there was no reference to the representations by then said to have been made by the 3rd respondent to them. The Commissioner, Corporation of Madras, however, was of the view, as expressed by him in his letter dated 31st December, 1971, that the writ petitioner was continuing in the post of Assistant Educational Officer from 7th July, 1967 and that the Government not having refused to confirm the panel as suggested by the Corporation under sub-section (2), he was impliedly of the view that the Council acted in accordance with law. Incidentally he made it clear to the Government that all the four persons were fully qualified in accordance with the rules then in vogue. On the basis of such a communication received by the Government, the latter by the challenged order G.O. Ms.No. 168 Education Department, dated 1st February, 1973, felt that the appointment of the writ petitioner was contrary to the provisions of section 87 (1) of the Act and therefore the Government, in exercise of their residuary power under section 87 (3) of the Act, appointed the 3rd respondent regularly as Assistant Educational Officer in the vacancy caused in 1966 and added that A. Purna Ramesh may be appointed next if she is the seniormost. Consequent upon this the Commissioner issued an order reverting the writ petitioner as B.T. Supervisor. It is in these circumstances the present writ petition has been filed questioning the right of the State to issue the challenged order and for consequential reliefs.

2. In W.P. No. 1459 of 1973 S. Saradha is challenging the above order of the Government dated 1st February, 1973,

stating that the Government had no jurisdiction at all to interfere with the said order in exercise of their powers under section 87 (3), for that was not a vacancy which was to be filled up in accordance with section 87 (1), but that was an order appointing the petitioner as a reliever in case of leave vacancies and that was done for administrative convenience and the power of appointment is referable to section 85 (*b*) alone. No reason has been given by the Government to refuse to confirm the appointment of the writ petitioner as a person to relieve others when a leave vacancy arises. Section 87 (3) has a special purpose to serve and it cannot be understood as creating a residuary power under all circumstances. As no acceptable reason is given in the challenged order to set aside that part of the Council's resolution appointing the writ petitioner as a substitute for leave or any other vacancy that may arise and as no such power could be exercised under section 87 (3) of the Act it is claimed that the said order cannot interefere with her rights which flow from the order of the Council.

3. In the light of the facts already stated it was contended on behalf of Purna Ramesh, writ petitioner in W.P. No. 1462 of 1973, that the Government exceeded their powers in acting under section 87 (3) of the Act in setting aside the order of the Council appointing her as Class II Officer. It was said that the principles of natural justice have been violated in that she was not given an opportunity when the Government did act under section 87 (3) of the Act and appointed Abdul Jabbar, 3rd respondent, to the post. In any event it was said that the prescription as to time within which the Council should appoint person to a post in which a vacancy has arisen is only directory and not mandatory and that the Council's action in having taken up the subject beyond three months could only be understood as an irregularity and not as an illegality *ab initio*.

4. As regards the writ petitioner in W.P. No. 1459 of 1973 it was said that the Government could not act under section 87 (3) to disturb the appointment made by the Council and as the challenged order does not given any reasons as to why the Council's appointment of this writ petitioner to leave vacancies ought not to be confirmed, the said non-speaking order in so far as this writ petition is concerned has to be set aside.

5. On the merits, however, it was not disputed that all the candidates proposed by the Council when it ultimately appointed Purna Ramesh and Saradha to the posts as set out above are equally merited and qualified. But amongst four of them it was also not in dispute that the 3rd respondent, Abdul Jabbar, Headmaster, Corporation Urdu Boy's High School, Washermanpet, Madras 21, was the senior -most in the pool of officers to be considered for selection. As it is the general rule that in all selection posts if merit and ability are approximately equal, seniority is the guiding factor, the 3rd respondent would state that he has been overlooked without any justification and therefore he had to approach the Government for relief.

6. I shall first dispose of the contention that the principles of natural justice have not been adhered to in the instant case. The Government is exercising power as a superior statutory functionary under the provisions of the Act in the matter of selecting proper personnel to vacancies which have arisen in the establishment. If such subjects which are within their jurisdiction come up for consideration by them either for confirmation or for scrutiny, that would not be a proceeding which is equatable to a *lis*, which position alone would compel the scrutinising authority to hear adequately the persons interested in the subject-matter and ultimately decide. As principles of natural justice are not understood in the abstract and are equally not inflexible but has to be applied according to the facts and circumstances of each case, I am not satisfied that there has not been a fair disposal of the subject-matter in question on the only ground that Purna Ramesh was not heard in person or that representations were not called for by the Government when they acted under section 87 (3) of the Act. The Government, as would be seen hereafter, felt that there was an omission on the part of the Council to appoint a Class II Officer within the time

prescribed under section 87 (1) of the Act. The post not having been filled up in accordance with section 87 (1) of the Act and as there was a default in such an appointment in that manner, the State Government invoked their residuary powers under sub-section (3) of section 87 and appointed the 3rd respondent who was the seniormost among the candidates proposed to the post. I have already referred to the fact that the Commissioner, Corporation of Madras, in his note dated 31st December, 1971 to the Government, categorically stated that the four individuals recommended by the Commissioner were all fully qualified in accordance with the rules then in vogue.

7. Under section 85 of the Act, every appointment in any office included in Class I-B or Class II shall be made by the Council and shall be subject to confirmation by the State Government. Section 87 which is the sheet anchor of the contentions of both the parties can be extracted:

> "87. (1) If a vacancy occurs in any office included in Class I-B or Class II, or any new office in Class I-B or Class II is created, the council shall within three months appoint any qualified and suitable person to hold such office.
>
> (2) If the State Government refused to confirm the appointment so made, the council shall appoint some other qualified and suitable person within forty-five days from the receipt of the order refusing confirmation.
>
> (3) In default of any appointment being made in accordance with sub-section (1) or sub-section (2), as the case may be, the State Government may appoint a person who in their opinion, is qualified and suitable to hold the office and such person shall be deemed to have been appointed by the council.
>
> (4) Pending an appointment under sub-section (1) or sub-section (2), the Council may appoint a person to hold the office temporarily and assign to him such salary as it may think fit:
>
> Provided always that the salary so assigned shall not exceed the maximum fixed by the State Government by rules in respect of the office".

In the light of these statutory provisions, the contentions of parties have to be considered.

8. Normally if a statute prescribes a formal time limit for the performance of a statutory duty without specifying any consequence in default of compliance with such a mandate, then such a prescription is directory and not mandatory.

9. It would be sufficient to refer to the following decisions which throw light upon the discussion on the point as to what is mandatory and what is directory. The leading case which is oft quoted is that of the Privy Council reported in *Montreal Street Railway Company* v. *Normandin*[1]. The principle therein stated is that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold *null* and *void* acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only and not imperative. In *Rattan Anmol Singh* v. *Ch. Atma Ram*[2] the Supreme Court said that when the law enjoins the observance of a particular formality, it cannot be disregarded and the substance of the Rule must be followed. This principle was followed by the Supreme Court in *Babu Ram* v. *Smt. Prasanni*[3]. No doubt, that was a case which arose under the Representation of the People Act and an election contest was viewed by the Supreme Court. Gajendragadkar, J., adopting the earlier observations of the Supreme Court in various cases made a distinction between defects which are of a substantial character and those which are not of a substantial character. In essence the Supreme Court has repeatedly said that when a statute prescribes a mandate, may be in relation to time within which the statutory func-

1. (1917) A.C. 170.
2. 1954 S.C.J. 731: (1955) 1 S.C.R. 481: (1954) 2 M.L.J. 435: A.I.R. 1954 S.C. 510.
3. 1959 S.C.J. 42: 1959 S.C.R. 1403: A.I.R. 1959 S.C. 93.

tionary should act or may be it relates to any other formality, such a mandate ought to be complied with if the non-observance of it would cause a serious defect and would enable the statutory authority to act in any manner it likes. It would be encouraging intransigence on the part of the statutory functionary if it were allowed lightly to disregard prescriptions made by the statute regarding the manner of exercise of power and particularly in a case where a consequence is provided in the Act itself in case the peculiar prescription as to time, as in this case, is not observed. In the language of our learned Chief Justice in *Guruswamy Reddiar* v. *Secretary, Regional Transport Authority, South Arcot*[1], where a statutory provision prescribes a time limit for doing a certain thing it is always a matter of construction whether its consequence is one of inhibition. The provisions of the statute themselves may give an indication. In other cases, the circumstance of the situation, or the justice of the matter may have a bearing. Therefore, in a case where a peculiar consequence is expressly provided for in the statute itself, then the general consideration as to whether the non-adherence to the rule would lead to injustice or affection of rights of third parties are all considerations which are really alien to the problem. Therefore, if a statute having regard to the objects for which the provisions relating to the appointment of Officers to the establishment of the Corporation are concerned says that a vacancy should be filled up within a period of three months by the Council and if it also provides that in default of such an appointment by the Council the State Government can interpose and act on their own and make the appointment, then this consequence makes it clear that the prescription as to time is not purely directory but is obligatory.

10. I may also refer to a decision of the Supreme Court in *Raja Buland Sugar Company Limited Rampur* v. *The Municipal Board, Rampur*[2], which deals with such a proposition :

"The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory canot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

In the instant case, therefore, it has to be found whether a serious general inconvenience or injustice to persons has been done.

11. The writ petitioner was aware that she was only appointed temporarily to the post pending approval by the competent authority. This by itself shows that the writ petitioner had no right to the post for her to seek for the discretionary relief under Article 226 of the Constitution. It is only in cases where there is an infringement of a vested right that a person can be said to be inconvenienced or affected. But when the said right which is agitated is incomplete and not so vested, then the person who seeks for the enforcement of such an inchoate right obtained by her cannot be said to be an aggrieved person. In the present circumstances it cannot be said that any public inconvenience or much less any inconvenience to the writ petitioner has occurred. She was occupying the post temporarily knowing fully well that she should quit the office if the Government does not approve of the resolution of the Council. The principles enunciated by the Supreme Court that in case where a general inconvenience has to be averted the situation created by the irregular exercise of power by a statutory

1. W. A. No. 1 of 1973.
2. (1965) 1 S.C.R. 970 : A.I.R. 1965 S.C. 895.

functionary has to be winked at and tolerated does not squarely apply to the instant case.

In the decisions the proposition is well-established that a bare prescription as to time without furthering the intention by providing any consequence in case of non-compliance of the same has always been understood not as a mandate, but as a directive which is excusable and tolerated because it is of no consequence. But if on the other hand the prescription as to time is a well thought of directive coupled with a duty to act accordingly, then such a rule as to time has to be understood as a mandatory rule.

12. Section 87 (1) has to be read with section 87 (3). Sub-section (1) of section 87, no doubt, barely refers to a rule of time within which the Council has to act and fill up a vacancy occurring in the office enumerated in that sub-section. Sub-section (3) however provides for the consequence in cases where the council fails to act within the time prescribed. The language of sub-section (3) is a pointer for interpreting the intention of the legislature as to whether the rule of time is directory or mandatory. If the council makes a default in filling up a vacancy occurring in Class II office, with which we are concerned, and so act in accordance with the prescription as to time, the residuary power to appoint a person who in the opinion of the State Government is qualified and suitable to hold the office springs automatically and if an appointment is made such a person shall be deemed to have been appointed by the Council. This consequence projecting the residuary power in the State to act in default has a special significance as it has an impact on the real meaning and intention of the expression "shall within three months appoint" appearing in sub-section (1) of section 87. If no such appointment is made, then in the popular as well as in the legal sense a default has been made in the matter of appointment in accordance with sub-section (1). Thus reading sub-section (1) in conjunction with sub-section (3), a meaningful purpose in the matter of appointment of officers in a vacancy in the specified offices appears. Even the marginal note is indicative of such a purpose. It speaks of the time within which vacancy in certain posts must be filled up. Though, no doubt, marginal notes are not invaluable guides for interpretation, they can certainly act sometimes as a basis to interpret. The word 'default' in sub-section (3) has to be understood as an omission. In *Fakir Chunder Dutt* v. *Ram Kumar Chatterjee*[1], the word 'default' was understood grammatically as a failure to perform. It is one of the cardinal rules of interpretation that the plain and grammatical meaning of the words in a statute should first be thought of before adopting any other meaning which is not ordinary and popular unless there is an ambiguity in its meaning or there are compelling circumstances goading the Court to adopt such a meaning. I do not find any such extraordinary circumstances in this case to interpret the word 'default' in sub-section (3) of section 87 in a manner other than ordinary. Understanding the word 'default' as an omission, the question is whether the verb 'shall' in sub-section (1) has to be still understood as merely directory or as 'may'. I have already referred to the salient principle that if a power is coupled with a duty, then such coupling makes the exercise of power a compulsory event and does not vest in the authority invested with such power a discretion to act as it pleases or beyond the directive, which is to be understood as a mandate annexed to the exercise of such a power. If the council fails to appoint a qualified and suitable person to hold the office in case any vacancy occurs in it within three months from the date of the occurrence of such vacancy in accordance with section 87 (1) then it appears to me that the residuary power of the State Government to act and appoint a suitable person of their choice is unquestionable as it is automatic.

13. The Supreme Court has repeatedly held that if a statute lays down the *modus operandi* for the statutory functionary to act and if the pattern and manner of such acting is clearly set out, then no other mode of effectuating the intention of the Legislature is available to such a functionary.

14. In our case the Legislature has designedly provided a pointer in case of an

1. (1904) I.L.R. 31 Cal. 901 at p. 908.

omission on the part of the Council to appoint within the prescribed time. If that is the basis for the challenged order and the State acted under section 87 (3) and exercised their power to appoint the 3rd respondent after noticing the default committed by the Council, it cannot be said that they acted without jurisdiction or that the order impugned poses an apparent error of law or any other apparent error.

15. The argument is put in a slightly different way. Some instances are brought to my notice wherein the Government did not interfere with such irregular appointments made by the Council. That situation ought not to be quoted as a precedent. If the person aggrieved in such situations tolerates such an irregularity and if the Government overlooks the omission on the part of the Council, it is not for a third party to rely upon such circumstances to further her own case under different circumstances. It cannot be denied that in those cases the Government ought to have acted as it did in the present case. But Courts ought not to give their seal of approval to perpetuate an irregularity and more so an illegality if it is brought to their notice. It would be wrong to encourage such non-exercise of statutory power. It is in these circumstances I am unable to hold that the practice in the Corporation of Madras should be taken as a guide for the interpretation of the nature of the power which the Government has under section 87 (3).

16. On the merits also the writ petitioner cannot seek for the rule as asked. Her appointment is made subject to the approval of the appropriate authority, which in the instant case is the State Government. This reservation made by the Council is not only for the purpose of serving the intendment of sub-section (2), but also for other purposes. If the appointment is made well within the prescribed time, it is left to the State Government to confirm the appointment or refuse to confirm the appointment. This is provided for in subsection (2) of section 87. If it refuses to confirm the appointment, the Council shall appoint some other qualified and suitable person within fortyfive days from the receipt of the order refusing confirmation. In my view, sub-section (2) of section 87 would come into play only if the vacancy has been filled up within three months from the date when it occurs. But, if at the inception the Council appoints a person beyond three months, thus avoiding the mandate as to the limit of time in sub-section (1) of section 87, then such an appointment is an irregular appointment. In such circumstances the power of the State Government to refuse to confirm the appointment is available under section 87 (3). The State Government could not act under sub-section (2) of section 87 because no occasion has arisen for it to confirm the appointment which is irregular and in the teeth of the provisions of sub-section (1) of section 87. It would be idle to contend that the State Government would confirm an appointment made by the Council if it is made beyond three months, because the State Government has the residuary power under sub-section (3) to appoint a person to the office by itself without leaving it to the Council to appoint some other qualified and suitable person within forty-five days from the date of receipt of the order refusing confirmation. It would be extraordinary if the State Government acts under section 87 (2) and refuse confirmation of the appointment. The word 'confirmation' implies that the appointment itself was regular. If an irregular appointment is sought to be confirmed or not confirmed then it is very doubtful whether the State Government can exercise such jurisdiction at all under section 87 (2). If for valid reasons the State Government cannot confirm such an irregular appointment *a fortiori* it follows that the State Government would be exercising a power when it has none in refusing to confirm an irregular or illegal appointment. The question of confirming an irregular appointment does not ordinarily arise in such circumstances. It is in the light of such eventualities which are possible that the Legislature has provided sub-section (3) of section 87 which enables the State Government as the ultimate repository of power and as residuary authority to act and appoint persons in the vacancies created.

17. As the appointment of the writ petitioner was not made within three months

from the date when the vacancy occurred, the Council made an initial mistake in selecting her even though the 3rd respondent was senior to her in service. As a matter of fact, the record discloses that the merits of all the candidates considered by the Council and by the Government were equal. The salient principle of selection is that if everything is equal as between the competing candidates then the seniormost has to be selected. This was also not borne in mind by the Council when it made the appointment beyond time. These factors were borne in mind by the Government when it acted under its residuary powers under section 87 (3) of the Act and appointed the 3rd respondent to the post.

18. One other view is also possible. As I said, the Council acted irregularly when it chose the writ petitioner to act in the vacancy subject to the approval of the State Government. Apart from the fact that the petitioner did not secure any right to the post, as she was only asked to act and the appointment itself was subject to the approval of the State Government, it is a voidable appointment in the sense that it is for the State Government to act either under section 87 (2) or section 87 (3). If the State Government is prepared to waive the irregularity and confirm the appointment under section 87 (2), it might do so. Even this is not proper exercise of power. But this question does not strictly arise for consideration in the instant case and excepting for observations already made I am not inclined to deal with that aspect in this case.

19. One other hesitant argument was put forward that the principles of natural justice have been violated since the petitioner was not called upon to state her objections to the representations made by the 3rd respondent. In the instant case the 3rd respondent was not preferring a revision petition or an appeal to the Government. He referred the subject-matter to the Government to point out to them how the Council acted. As I have already stated, the 3rd respondent was senior to the petitioner and their merits and ability were all approximately equal. The Government studied the situation in the eye of law and corrected an error on record by exercising jurisdiction under section 87 (3). It is not imperative that in all cases like this the person whose temporary appointment is going to be disturbed has to be consulted. This is not a lis between two parties where the Government was an adjudicator for deciding the dispute as between them. In the peculiar circumstances it does not appear to me to be necessary for the State Government to have referred the memorandum of the 3rd respondent to the petitioner, for they were not relatively adjudging the merits of the candidates, but on the other hand they were exercising their own power under the statute which was occasioned by the patent default or omission committed by the Council in that the temporary appointment was made long after the prescribed time and was therefore not in accordance with section 87 (1) of the Act. Even the equities and merits are not quite in favour of the writ petitioner. She is not senior to the 3rd respondent. Though it is a selection post, the 3rd respondent and herself are merited equally. Under the Government Order she has to be appointed in the next vacancy as the next in the hierarchy. These are pointers to the effect that the challenged order being just and fair does not even prompt me to exercise jurisdiction under Article 226 to interfere with the said order. In these circumstances W.P. No. 1462 of 1973 is dismissed and there will be no order as to costs.

20. *W.P. No.* 1459 *of* 1973:—The point for consideration in this writ petition is very simple. The writ petitioner has been appointed by the Council as a reliever in case any vacancy arises in the future. Such an appointment is not squarely within the meaning of section 87 (1) of the Act. The vacancy contemplated in section 87 (1) is not an expected or anticipated vacancy but a real vacancy. The writ petitioner was appointed as substitute for leave or any other vacancy that may arise. It is therefore clear that as on the date of appointment she was not to fill up a vacancy which has arisen before three months from the date of appointment. It is only to enable the writ petitioner to act in the contingency of a leave vacancy or any other similar

vacancy arising that she has been appointed as a stop-gap measure for purposes of continuity and eventually in public interest. Probably this has been done by the Council in exercise of its rights as a primary administrative body functioning under the Act. The State Government interfered with such a decision of the Council treating it as if it was an appointment made under section 87 (1) and by providing for themselves power to act under section 87 (3). As I said, the appointment of the writ petitioner by the Council is not under section 87 (1) and it cannot be. In such circumstances the residuary power under section 87 (2) or (3) is not available to the State Government to set aside such an administrative order of the Council. Whatever power the State Government may have otherwise under the provisions of the Act, it has no power to disturb that order, under the guise of exercise of power under section 87 (3). The impugned order expressly says that the appointment of the writ petitioner is as a relieving officer and not as an officer who would permanently fill up a post which has fallen vacant. As the appointment cannot be interpreted to be one under section 87 (1) the State Government cannot assume power under section 87 (3) to set aside that order. In this behalf there is an error apparent. In so far as the appointment of the writ petitioner for the purpose as above has to be sustained as the State Government has exercised jurisdiction when it has none under section 87 (3) and in this behalf there is an error of law apparent in the record. I may incidentally add that the State Government while passing the challenged order did not expressly refer to the appointment of Saradha to fill up leave vacancies. But the Corporation of Madras obviously understood the order of the State Government in that way. There is no disturbance of that part of the Council's resolution by the State Government in so far as Saradha is concerned. Viewing this in that light the petitioner cannot complain. But as the order has been understood by the Corporation of Madras so as to deprive her of the right to act in the leave vacancy though she has been appointed as such by the Council in exercise of its authority as the administrative functionary in the Corporation, she has come up to this Court. It is in this perspective that she is entitled to relief. This writ petition is allowed. There will be no order as to costs.

S.J. *W.P. No.* 1462 *dismissed.*
W.P. No. 1459 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*M. M. Ismail, J.*

S. Sankararamakrishnan .. *Petitioner**

v.

The State of Tamil Nadu, represented by the Secretary, Education Department, Fort St. George, Madras-9 and another .. *Respondents.*

V. Selvaraj .. *Petitioner.*

v.

The Secretary, Education Department, Government of Tamil Nadu, Fort St. George, Madras-9 and another .. *Respondents.*

(A) *Constitution of India* (1950), *Article* 226—*Writ petition—Opportunity to lead evidence and to cross-examine respondent—Cannot be given.*

It is not possible to convert the proceedings in a writ petition into a regular trial as if it were a suit and to give an opportunity to the petitioner to lead evidence or to cross-examine the respondent. If the petitioner wants to pursue this point the proper remedy for him is to file a suit in which he will have an opportunity of giving evidence and submitting himself to cross-examination and equally cross-examining any witness that may be examined on behalf of the respondent. [*Para.* 8.]

(B) *General Rules for the Tamil Nadu State and Subordinate Services, Rule* 10 (a) (*v*)—*Constitutional validity.*

There is no substance in the contention that rule 10 (*a*) (v) of the General Rules

*W.P. Nos. 5454 and 5564 of 1973.
26*th October,* 1973.

for the Tamil Nadu State and Subordinate Services is unconstitutional. A person is appointed temporarily under rule 10 (*a*) (i), when the post in question cannot be filled in accordance with the rules prescribed therefor and very often unqualified persons are appointed temporarily till qualified persons are available and therefore by the very terms of the appointment, such a temporary appointment is capable of being terminated at any time without assigning any reason. Once a person got himself appointed only under rule 10 (*a*) (i) it is not open to him to contend that the other part of the rule namely rule 10 (*a*) (v) should not be applied to him. The very temporary character of the appointment involves and implies the inevitable and necessary consequence of the said appointment being terminated at any time without assigning any reason therefor. Further, it is well settled that a discretionary power is not necessarily discriminatory.

[*Para.* 26.]

(C) *Constitution of India* (1950), *Articles* 311, 14 *and* 16—*General Rules for the Tamil Nadu State and Subordinate Services, rules* 10 (a) (*i*) *and* 10 (a) (*v*)—*Temporary Government servant—Termination of services of—Article* 311, *when attracted—Petitioners appointed as temporary part-time lecturers of Madras Law College under rule* 10 (a) (*i*)—*Director of Legal Studies sending demi-official letter to Government stating that petitioners were unsuitable for the post—Government acting under rule* 10 (a) (*v*) *terminating services of petitioners without assigning any reason—Article* 311 *if attracted—Order if liable to be challenged as discriminatory.*

When a person is appointed temporarily, generally it is done in order to meet a particular contingency or emergency and such an appointment is capable of being terminated whenever that emergency or contingency ceases. [*Para.* 28.]

In the present case the Director of Legal Studies communicated to the Government about his assessment of the suitability of the petitioners to continue in the post of part-time lecturers in the Law College and in his opinion they were unsuitable. The termination of the services of the petitioners on such a basis cannot be said to be one by way of punishment or one which involves a stigma and therefore it does not attract the application of Article 311 of the Constitution.

[*Para.* 28.]

It has been settled by the decisions of the Supreme Court that the motive operating in the mind of the authority in terminating the services of a temporary servant does not alter the character of the termination and is not material in determining the said character. [*Para.* 30.]

In the present case no charge was framed against the petitioners, no imputation was made against them and no enquiry was conducted. The termination order, apart from referring to the two Government Orders under which the petitioners were temporarily appointed as part-time lecturers of the Madras Law College referred to the demi-official letter sent by the Director of Legal Studies to the Government. Solely on the basis of this demi-official letter in which the Director of Legal Studies had expressed his opinion about the suitability of the petitioners to be continued as part-time lecturers and his recommendation with reference to the petitioners, it cannot be contended that the order is punitive in nature. It is admitted that the impugned order is an order of discharge simpliciter. One of the circumstances in which the services of a temporary Government servant can be terminated is when that temporary Government servant is found unsuitable to continue in office. In the present case the Director of Legal Studies is the head of the Law College and he is the competent person to observe the performances of the petitioners and in that capacity if he had expressed opinion to the Government and sought the impugned order of the Government it cannot be contended that any stigma is attached to the petitioners. Therefore the impugned order is not punitive in character and does not attract Article 311 of the Constitution. [*Para.* 36.]

It is the impugned order alone that is for examination and so long as that order does not contain any express words attaching any stigma to the Government servant concerned, the Court cannot go behind that order to examine the files for the purpose of finding out whether some kind of stigma was contemplated or,

not. Notwithstanding this legal position, in the present case, even if the circumstances attending the passing of the impugned order were considered it must be held that the same was not by way of punishment and therefore Article 311 of the Constitution is not attracted.

[*Paras*. 39, 41.]

(Earlier the Court held that the impugned order was not shown to be *mala fide* and that therefore there was no scope for the contention that the passing of the order constituted colourable exercise of power.) [*Paras*. 12, 22, 24.]

Since the Government has not at all traversed or denied the allegation made by each of the petitioners that he has been singled out among the temporary part-time lecturers and his services have been terminated arbitrarily and that there are part-time lecturers appointed subsequent to the petitioners who were less qualified, even though the impugned order is not *mala fide* and it does not attract Article 311 of the Constitution and the Government has the power to terminate the services of the petitioners on the ground that they were found unsuitable to hold the post, without following the procedure prescribed in Article 311, the impugned order should be quashed on the sole ground that the allegations of the petitioners that they have been singled out and arbitrarily dealt with as among the several part-time lecturers in the Law College has not been refuted by the Government by placing before the Court the circumstances under which the Government happened to pass the impugned order. [*Paras*. 46, 48.]

Cases referred to :

The State of Punjab v. *Ramji Lal and others*, (1971) 2 S.C.R. 550 : (1971) 2 S.C.J. 348 : A.I.R. 1971 S.C. 1228; *Sukhbans Singh* v. *The State of Punjab*, (1963) 1 S.C.R. 416 : A.I.R. 1962 S.C. 1711; *K. H. Phadnis* v. *State of Maharashtra*, A.I.R. 1971 S.C. 998; *Champaklal Chimanlal Shah* v. *The Union of India*, (1964) 5 S.C.R. 190 : A.I.R. 1964 S.C. 1854; *Parshottam Lal Dhingra* v. *Union of India*, 1958 S.C.J. 217 : 1958 S.C.R. 828 : (1958) 1 Lab.L.J. 545 : A.I.R. 1958 S.C. 36; *Jagdish Mitter* v. *The Union of India*, A.I.R. 1964 S.C. 449; *State of Bihar* v. *Gopi Kishore Prasad*, A.I.R. 1960 S.C. 689; *The State of Punjab and another* v. *Sukh Raj Bahadur*, (1968) 3 S.C.R. 234 : (1969) 1 S.C.J. 51 : A.I.R. 1968 S.C. 1089; *State of Bihar and others* v. *Shiva Bhikshuk Mishra*, (1971) 2 S.C.R. 191: (1971) 2 S.C.J. 68: A.I.R. 1971 S.C. 1011; *The State of Orissa and another* v. *Ram Narayan Das*, (1961) 1 S.C.R. 606 : (1961) 1 S.C.J. 209 : A.I.R. 1961 S.C. 177; *Madan Gopal* v. *The State of Punjab and others*, (1963) 2 S.C.J. 185: A.I.R. 1963 S.C. 531; *Union of India* v. *R.S. Dhaba, Income-tax Officer, Hoshiarpur*, C.A. No. 882 of 1966, dated 7th April, 1969; *The State of U.P.* v. *Shyam Lal Sharma*, (1972) 1 S.C.R. 184 : A.I.R. 1971 S.C. 2151; *Saksena's case*, (1967) 2 S.C.R. 496: A.I.R. 1967 S.C. 1264: *Dalip Singh's case*, (1961) 1 S.C.R. 88: (1961) 2 S.C.J. 58: A.I.R. 1960 S.C. 1305.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the respective affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* (1) and quash the the order dated 17th September, 1973 contained in Memorandum No. 35097 F2/73-7 Edn. of the Government of Tamil Nadu so far as it concerns the petitioner (in W.P. No.5454 of 1973) and (2) calling for the records relating to the Memorandum No. 35097-F2/73-7 Edn. dated 17th September, 1973 of the first respondent and quash the same (in W.P. No. 5564 of 1973).

G. Vasantha Pai for *K.V. Padmanabha Rao* and *S. Padmanabhan*, for Petitioner.

Advocate-General assisted by *S. Ramalingam*, Assistant Government Pleader, on behalf of Respondents.

The Court made the following

ORDER.—The petitioners in these writ petitions are two Advocates of this Court and the common respondents are the State of Tamil Nadu, represented by the Secretary to Government, Education Department, Fort St. George, Madras-9 and the Director of Legal Studies, Law College, Madras-1. The petitioner in the former writ petition was appointed as a part-time Lecturer in the Law College, Madras, under rule 10 (*a*) (i) of the General Rules for the Tamil Nadu State and Subordinate Services, by G.O.Ms.

No. 1428, Education Department, dated 18th August, 1970, while the petitioner in the latter petition was appointed in the same capacity under the same rule by G.O.Ms. No. 1834, Education Department, dated 25th October, 1971. By a Memorandum No. 35097-F2/73-7 Education dated 17th September, 1973, the first respondent herein terminated the services of the petitioners with effect from the date of relief and it is to quash this order that the two writ petitions have been filed by the petitioners herein.

2. Both the petitioners challenge the impugned order on the following grounds, namely: (1) that the same is *mala fide;* (2) that it really amounts to one of punishment and consequently the requirements of the provisions of Article 311 of the Constitution of India should have been complied with and in the present case, they have not been complied with; and (3) that the order is discriminatory and therefore offends Articles 14 and 16 of the Constitution of India. In addition, the learned Counsel for the petitioner in the latter writ petition contends that the power exercised by the first rsepondent in terminating the services of the petitioner therein constituted a colourable exercise of power on the part of the respondents and rule 10 (*a*) (v) of the General Rules for the Tamil Nadu State and Subordinate Services is itself unconstitutional and discriminatory and is hit by Articles 14 and 16 of the Constitution of India.

3. In the affidavit filed in support of the former writ petition, the petitioner therein challenges the impugned order as *mala fide* on two specific grounds. In paragraph 3 of the affidavit, the petitioner avers that in the year 1972, the second respondent called the petitioner to his chambers in the Law College and enquired of him as to whether he had any connection with a writ petition filed by Thiru V. Selvaraj, the petitioner in the latter writ petition, against the State in respect of appointments made by the Public Service Commission without considering the requisite qualifications necessary for the post of part-time lecturer in the Law College and the petitioner immediately told the second respondent that he had no manner of connection whatever with the filing of that petition and that the second respondent should not hold that out against the petitioner in the mistaken belief that he had a hand in the same. In paragraph 4 of the affidavit, he alleges that he understood that recently in the Supreme Court, in a petition filed by the Ex-Chief Secretary to the Government of Tamil Nadu, Thiru V. Selvaraj, the petitioner in the latter writ petition, was instructing the Counsel for the Ex-Chief Secretary in the Supreme Court and that the hearing of the said case was concluded in August, 1973; that after the impugned order was passed, the petitioner on 25th September, 1973 at 12 noon called on the second respondent at his office in the Law College Buildings and enquired of him as to what was contained in the confidential report and why his explanation had not been called for, if there was anything materially wrong with his conduct; that the second respondent refused to divulge at first the reason which was contained in the said confidential report, but later informed the petitioner that the whole matter hinged on the petitioner's conduct in Mr. Royappa's case as Counsel working for him, behind the scenes and assisting Mr. Selvaraj; that he, the petitioner, denied the allegation and requested the second respondent to intercede on his behalf; and that the second respondent then frankly told the petitioner that while he (the second respondent) was satisfied with his (petitioner's) work, any recommendation by him then made would not have any weight with the first respondent which had made up its mind to terminate the petitioner's services without assigning any reason whatever, for his alleged connection along with Mr. V. Selvaraj in the Royappa's case. It is with reference to these allegations that the petitioner stated in paragrpah 5 of the affidavit that the termination of his services in the above circumstances was *mala fide* and without any basis whatever. The petitioner further avers in the affidavit that as a matter of fact he had no connection with any Counsel who was connected with the case of Mr. Royappa; nor had he any connection with Mr. E.P. Royappa, Ex-Chief Secretary, who was a total stranger to him; and that to attribute to him such intimate connection and to consider him as having been secretly assisting the said person against the Government was, to say the least, false

and a vicious statement intended to wreck his career and divest him of his lecturership without giving him an opportunity to be heard in that behalf.

4. Since the allegations in the affidavit referred to the meeting which the petitioner was alleged to have had in the year 1972 and on 25th September, 1973, the second respondent in his counter-affidavit has dealt with the same. In paragraph 3 of the counter-affidavit the second respondent completely and totally denies that he called the petitioner in the year 1972 to his chambers in the Law College and enquired of him as to whether he had any connection with a writ petition filed by Thiru V. Selvaraj against the State in respect of the appointments made by the Public Service Commission. He, therefore, contends that the further allegation that the petitioner told him (the second respondent) that he had no manner of connection with that writ petition was also not true and further states that no such discussion took place between the second respondent and the petitioner and that such a story had been deliberately concocted for the purpose of prejudicing the mind of this Court. In paragraph 4 of the counter-affidavit, the second respondent avers that the allegations of the petitioner in paragraph 4 of his affidavit that Thiru V. Selvaraj was instructing the Counsel for the Ex-Chief Secretary in the case before the Supreme Court was not a matter within his personal knowledge. The second respondent admits that he sent a demi-official letter dated 11th April, 1973 to Thiru Balraj, Deputy Secretary, Education Department, regarding some of the lecturers of the Law College and that letter was written in his capacity as the Head of the Department of Legal Studies, regarding their suitability and continuance in service and that such confidential inter-Departmental communications were not intended for service on the employees concerned. In paragraph 4 of his affidavit that on 25th September, 1973 at 12 noon the petitioner called on the second respondent was false and that the allegation that the petitioner enquired the second respondent as to what was contained in the confidential report and as to why his explanation had not been called for and wanted to know whether there was anything materially wrong with his conduct was not correct. In this paragraph, the second respondent totally denies that there was any meeting between the petitioner and the second respondent on 25th September, 1973 or there was any conversation as alleged in the affidavit of the petitioner.

5. The petitioner in this writ petition has filed a reply affidavit reiterating his allegation in the affidavit in this behalf, and contending that the denial of the second respondent was deliberate and made only for the purpose of the case.

6. On behalf of the first respondent, a counter-affidavit has been filed by the Secretary to Government in the Education Department. In paragraph 3 of this counter-affidavit, he states that with reference to the allegations in paragraph 4 of the affidavit of the petitioner, "I submit that I have absolutely no knowledge of the alleged conversation that took place between the petitioner and the second respondent in which the second respondent is said to have informed the petitioner that I had made up my mind to terminate his services without assigning any reason whatever for his alleged connection along with Mr. Selvaraj in Royappa's case". In paragraph 4 of the counter-affidavit, he further avers: "The allegation in paragraph 5 of the affidavit that the termination of the petitioner's services is *mala fide* is stoutly denied".

7. In view of the above counter-affidavits, Mr. G. Vasantha Pai, learned Counsel for the petitioner in the former writ petition, sought to make out three points. The first is, that the petitioner must be given an opportunity to cross-examine the second respondent, in view of his total denial of the allegations made by the petitioner in his affidavit. The second is, that the first respondent has merely stated that he had absolutely no knowledge of the alleged conversation that took place between the petitioner and the second respondent, but he did not independently deny that the first respondent had made up its mind to terminate the services of the petitioner without assigning any reason whatever for his alleged connection along with Mr. Selvaraj, in Royappa's case. The third, is that the second respondent in paragraph 4 of his counter-affidavit, while dealing

with the allegations in paragraph 4 of the affidavit of the petitioner stated that he would be producing "for the perusal of this Hon'ble Court the original of my demi-official letter dated 11th April, 1973 at the time of the hearing of the writ petition", and this clearly shows that the second respondent had taken back the demi-official letter sent to the first respondent and had the same in his custody and this itself establishes *mala fides*.

8. In my opinion, there is no substance in any of these three points. As far as the first point is concerned, it is not possible to convert the proceedings in this writ petition into a regular trial, as if it were a suit and to give an opportunity to the petitioner to lead evidence or to cross-examine the second respondent. If the petitioner wants to pursue this point, the proper remedy for him is to file a suit in which he will have an opportunity of giving evidence and submitting himself to cross-examination and equally cross-examining any witness that may be examined on behalf of the respondents herein. Therefore, I have necessarily to proceed on the basis that this controversy cannot be gone into and decided in this proceedings.

9. With regard to the second point, I am clearly of the opinion that in the absence of any specific allegations in the affidavit filed by the petitioner that the first respondent had made up its mind to terminate the services of the petitioner without assigning any reason whatever for the alleged connection of the petitioner with Mr. Selvaraj in Royappa's case, there was no obligation cast upon the first respondent to independently deny the same. As I have pointed out already, the only allegation that has been made in this behalf by the petitioner is that the second respondent told him to that effect. But the second respondent has denied the entire meeting between the petitioner and himself and consequently the only thing that the first respondent could do was to say whether he had any knowledge or not of the said conversation and there was no further obligation imposed on the deponent of the counter-affidavit filed on behalf of the first respondent to further say whether the first respondent had made up its mind to terminate the services of the petitioner without assigning any reason whatever for his alleged connection with Mr. Selvaraj in Royappa's case.

10. As far as the third point is concerned, the contention is far-fetched. The word, "original" occurring in the counter-affidavit of the second respondent obviously is a mistake. Before me, the file of the Government containing the original of the demi-official letter sent by the second respondent and the office copy of the same maintained by the second respondent have been produced. There is absolutely no scope for any argument that the second respondent took back the demi-official letter sent by him to the first respondent and had it in his custody and it is that original the second respondent promised to produce before this Court at the time of the hearing. The entire argument was based upon the word, "original" occurring in the counter-affidavit of the second respondent which expression obviously was used only to refer to the copy which he had with him.

11. In this context, Mr. Vasantha Pai relied on the following passage occurring in the judgment of the Supreme Court in the *State of Punjab* v. *Ramji Lal and others*[1]:

> "Counsel for the State of Punjab contended that the plea that the action of the State was not *bona fide* cannot be said to be established, unless the party alleging that case names the officer or officers guilty of conduct which justifies an inference that the official act was done for a collateral purpose, and since no such attempt was made and the High Court did not find that any named officer or officers was or were responsible for that official act the plea that it was not *bona fide* must fail. We do not think that the law casts any such burden upon the party challenging the validity of the action taken by the State Government. The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority, and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all with-

1. (1971) 2 S.C.J. 348 : (1971) 2 S.C.R. 550 : A.I.R. 1971 S.C. 1228 at 1231.

in the knowledge of the State Government, and it would be placing an intolerable burden in proof of a just claim to require a party alleging *mala fides* of State action to aver in his petition and to prove by positive evidence that a particular officer was responsible for misusing the authority of the State by taking action for a collateral purpose".

I am of the opinion that the above passage has no relevancy whatever to the facts of the present case, which I have set out already in full with reference to the allegations and denials contained in the affidavit and reply affidavit and the counter-affidavits.

12. Further, there is this additional fact. The authority competent to terminate the services of the petitioner and did terminate them is the first respondent. Admittedly, there is no averment in the affidavit directly alleging *mala fide* against the first respondent. Therefore, I must proceed on the basis that the impugned order of the first respondent is not shown to be *mala fide*.

13. The charge of *mala fides* in the latter writ petition has been made on the basis of a different set of allegations. The petitioner therein states in his affidavit that about November, 1971 the Tamil Nadu Public Service Commission called for applications to fill permanent vacancies of full-time junior Professors and part-time Lecturers in the Law College under the rules prescribed therefor and the Public Service Commission selected a number of unqualified persons, rejecting the claims of really qualified persons including the petitioner therein; and that the petitioner thereafter filed a writ petition, W.P. No. 962 of 1972 on the file of this Court challenging the selection made by the Public Service Commission. According to the petitioner, in the affidavit filed in support of that writ petition, the petitioner herein had stated that the second respondent was one of the Members of the Selection Committee in his capacity as the Director of Legal Studies for the selection of the candidates, that the 18th respondent to W.P. No. 962 of 1972 is the wife's brother of the second respondent, that the second respondent participated in assessing the merits and demerits of the various applicants, that he was able to influence the selection of the 18th respondent to that writ petition, though he did not possess the necessary qualifications; and that certain other persons were selected as they happened to belong to the same community as the second respondent. The petitioner herein further challenged the selection on the basis that favoured treatment was given to persons who were in some way or other connected with the ruling D.M.K. party and contended that the petitioner was victimised, he being a member of the Nadar community in Kanyakumari District, which is the only District which did not return any but one member of the ruling party to the Tamil Nadu Legislative Assembly in the last election. According to the petitioner, to that writ petition he had impleaded the first respondent as well as the second respondent herein as respondents 1 and 3 and the Chairman of the Public Service Commission as the second respondent and selected candidates were impleaded as other respondents; counter-affidavits were filed by Thiru K. Diraviam on behalf of the first respondent and by Thiru A. Palaniswamy, the third respondent; and in the counter-affidavit, the first respondent had stated that the Government, on a careful consideration, had decided not to grant any exemption from the prescribed qualifications and had passed orders appointing those who fulfilled all the necessary qualifications as per the notification and the deponent had taken objection in the counter-affidavit to the petitioner's allegation in the affidavit filed by him. The petitioner further avers that there was subsequently another selection by the Public Service Commission at which also the petitioner was not selected; that during the pendency of the writ petition, finding that the favoured persons could not be taken into the college, the second respondent filed a petition before this Court stating that the College was in urgent need of lecturers, that the students were threatening to strike for want of sufficient teaching staff, that fully qualified persons were not available for appointment and that therefore he should be permitted to make temporary appointments under rule 10 (*a*) (*i*) of the General Rules for the Tamil Nadu State and Sub-

ordinate Services. The petitioner then contends that the permission was granted and ultimately in view of the statement made by the first respondent in the counter-affidavit, the writ petition itself was dismissed as withdrawn. On the basis of these allegations, the petitioner herein states in paragraph 18 of his affidavit that ever since the filing of that writ petition, the second respondent was not favourably disposed towards him and the petitioner felt that the reason for his being so was the filing of that writ petition by him.

14. The second aspect of the allegation of *mala fides* is based on the fact that the petitioner herein was engaged by Mr. E.P. Royappa, the former Chief Secretary of the State of Tamil Nadu to appear in his case in W.P. No. 284 of 1972 before the Supreme Court of India and that he actively assisted the Counsel appearing in the Supreme Court in the conduct of his case by inspecting all the Government files relevant to the case in the secretariat under the orders of the Supreme Court and taking notes and preparing fascimile copies of documents for that purpose.

15. According to the petitioner, these two sets of facts have infuriated the respondents herein and consequently the impugned order, which was *mala fide*, was passed for the purpose of getting rid of the petitioner and satisfying the personal grudge of the authorities against the petitioner. The petitioner alleges that the respondents were ill-disposed towards him on account of the representations made by him to the different authorities regarding the manner in which selection of part-time and full-time Lecturers was made and his filing the writ petition, W. P. No. 962 of 1972. He further avers that the allegations made by him in the affidavit filed in support of that writ petition infuriated the respondents and the said allegations naturally created a personal grudge in the minds of the respondents against the petitioner and that it was evident that they had been biding their time to terminate the services of the petitioner. According to the petitioner, the statement made by Mr. Diraviam in in the counter-affidavit filed in W.P. No.962 of 1972 was to the effect that the petitioner made reckless allegations; further Mr. Diraviam had even expressed surprise at the petitioner, who was a Government servant, having made such allegations. The petitioner further states that that the above statement of Mr. Diraviam only showed the extent to which he was personally affected by the averments made by the petitioner in W.P. No. 962 of 1972. According to him, the fact of his having filed W.P. No. 962 of 1972 and thereby the respondents being compelled to agree that they would not appoint unqualified persons naturally caused bitterness in the minds of the respondents and that is the cause for the impugned order. The petitioner goes to the extent of saying that for the above reasons the respondents were interested in getting rid of him somehow or other and they could not be expected to take a dispassionate and impartial attitude in the case of the petitioner.

16. An elaborate counter-affidavit has been filed by the second respondent herein and in that counter-affidavit, the second respondent, while referring to the selection made by the Public Service Commission, the writ petition filed by the petitioner and the counter-affidavit filed by him, contends that those facts did not create in his mind any bias or prejudice. He further states in the counter-affidavit that the counter-affidavit filed by the respondents in W.P. No. 962 of 1972 may be read as part and parcel of the counter-affidavit filed by him in the present writ petition. In that counter-affidavit he had stated:

> "It is true that Thiru Doraiswamy is my brother-in-law but it is totally false to say that I participated either in the assessment of merits or in the deliberation of the Commission in regard to his selection. In fact I did not at all participate in his selection I have endorsed this fact in the records of the Tamil Nadu Public Service Commission nor did I participate in the discussions either for his selection. The selection was done entirely by the other members of the Tamil Nadu Public Service Commission and therefore there is no question of any influence being brought upon the other Members of the Tamil Nadu Public Service Commission. Since I did not participate there was absolutely no

> embarrassment to the other Members of the Commission. The statement that the direct personal interest of mine in one of the candidates vitiated the entire selections is totally in correct and untenable".

The second respondent has further stated in his counter-affidavit that the respondents have no favourites; nor is the writ petitioner *persona non grata* with the second respondent; and that the second respondent as the Head of the Legal Department and as Director of Legal Studies in charge of administration of the Law College and entrusted with the task of coaching the students for the examination in law, was duty bound to study the suitability of the candidate who may apply for appointment as lecturer in the Law College and retain only such of those who are found suitable for the job. With regard to the allegations of the petitioner in relation to his active association with the conduct of Mr. Royappa's case, the second respondent has stated that they were not matters within his knowledge and that consequently the alleged association of the petitioner with the conduct of Mr. Royappa's case could not have had and did not have any influence on him at all with reference to his attitude towards the petitioner herein.

17. An independent counter-affidavit has been filed by the Secretary to Government, Education Department on behalf of the first respondent. Paragraphs 3 to 5 of the said counter-affidavit are as follows:

> "3. As regards the allegations in paragraph 22 (8) of the affidavit I submit I have neither personal nor official knowledge of the petitioner having been associated in any way with the case of Mr. Royappa and it is absolutely baseless to say that this alleged association had any influence on me in passing the impugned order.
>
> 4. Regarding the allegation mentioned in para.22 (9) I wish to state that it is correct to say that I filed a counter in W.P. No. 962 of 1972 denying the allegations made by the petitioner while challenging the selection for appointment of lecturers in the Law College by the Service Commission. Those proceedings have nothing to do with the impugned order and I wish to state categorically that the present impugned order was not in any way influenced or motivated by the said writ petition filed by the petitioner.
>
> 5. I totally deny the allegations of *mala fides* made against me or the Government while passing the impugned order".

A reply affidavit has been filed by the petitioner reiterating his contentions in the affidavit.

18. The question for consideration is, whether, having regard to the allegations made in the affidavit and reply affidavit of the petitioner and the counter-affidavits of the respondents, the case of *mala fides* alleged by the petitioner has been made out. As I have pointed out already, the allegations of *mala fide* spring from two different sets of facts. The first set of facts related to the filing of the writ petition, W.P. No. 962 of 1972 by the petitioner, in which he had made allegations against the first respondent as well as the second respondent herein. In my opinion, the mere fact that the petitioner filed such a writ petition and made such allegations cannot be said to have made the respondents herein to entertain any bias or prejudice against or illwill towards the petitioner herein. Filing of writ petitions by Government servants against the Government has become a daily occurrence now. Equally the allegations of *mala fides* made against the Government and other officers and authorities in the affidavits filed in support of writ petitions filed by Government servants have become a common feature. Therefore, if it is to be contended or held that the filing of such an affidavit and making of such an allegation have influenced the Government or the officers in Government in in one way or the other towards the Government servant concerned, every other Government servant could be the object of such illwill or prejudice. Further, in this particular case, it is admitted that it is Thiru K. Diraviam, who passed the impugned order in his capacity as Secretary to Government in the Education Department and the said Thiru K. Diraviam had no reason to bear illwill towards the petitioner because

of the allegations made in the affidavit filed by the petitioner in W.P. No. 962 of 1972, since none of the allegations had anything to do with Thiru K. Diraviam.

19. The only point that has been stressed in the affidavit filed in the present writ petition is that in the counter-affidavit filed by Thiru K. Diraviam on behalf of the first respondent in W.P. No. 962 of 1972 it is stated that the allegations made by the petitioner in that writ petition were reckless and it was surprising that a Government servant should have made such reckless allegations. I am unable to hold that simply because Thiru K. Diraviam had made such a statement in the counter-affidavit filed on behalf of the first respondent in W.P. No. 962 of 1972, he must be deemed or held to be prejudiced or biased against the petitioner herein.

20. The second set of facts related to the association of the petitioner in the conduct of Mr. Royappa's case. As far as that aspect in concerned, I do not see any reason why Thiru K. Diraviam, who passed the impugned order, should have been prejudiced or biassed against the petitioner for that reason. Thiru K. Diraviam is as much an officer of the Government as Mr. Royappa is and there is absolutely no reason why one officer of the Government functioning as Secretary of a particular Department should be prejudiced or biassed against another officer of the Government filing a writ petition against the State. Therefore I am unable to hold that in passing the impugned order, Thiru K. Diraviam was in any way biassed or prejudiced against the petitioner herein.

21. As far as the second respondent is concerned, taking the normal human nature into account, certainly he should have been piqued and embarrassed, when the petitioner herein in the affidavit filed in support of the writ petition, W.P. No. 962 of 1972 made personal allegations against him. However, I am of the opinion that that is not sufficient to hold that the second respondent was determined to get rid of the petitioner on that ground. The second respondent himself has stated in the counter-affidavit filed by him in that writ petition that he did not participate in the selection or assessment of the merits or demerits of his brother-in-law and that it was only the Members of the Public Service Commission who assessed the suitability of his brother-in-law. When that was the real position, it is too much to hold that the second respondent bore illwill towards the petitioner herein and wanted to get rid of him from his position as part-time Lecturer in the Law College, simply because he had made such allegations in the affidavit filed in support of that writ petition, which were not true, as borne out by the records. Further, every officer is expected to discharge his official duties fairly and objectively, irrespective of any personal predilections or prejudices and it is not every one who fails to rise up to the above expectation or standard. In my opinion, it is not possible to hold that the second respondent wanted to wreak vengeance on the petitioner herein or to wreck his career throwing away all the responsibilities and decencies and fair play attached to his office simply because the petitioner herein chose to make untrue allegations against him in the affidavit filed in support of W.P. No. 962 of 1972.

22. With regard to the association of the petitioner herein in the conduct of Mr. Royappa's case in the Supreme Court, the second respondent has stated in his affidavit that he had no knowledge of the same and that he had nothing to do with the same. There is absolutely no justification for coming to the conclusion that the said association of the petitioner in the conduct of Mr. Royappa's case had in any way prejudiced the second respondent against the petitioner, since the second respondent had absolutely no concern with that case. Therefore, I am clearly of the opinion that the allegations of *mala fides* made against the respondents herein had not been made out in the present case.

23. Mr. S. Padmanabhan, learned Counsel for the petitioner in the latter writ petition, drew my attention to the decision of the Supreme Court in *Sukhbans Singh* v. *The State of Punjab*[1] in which with reference to the facts and circumstances of that case, the Supreme Court held that the action of the Government in reverting the appellant in that

1. (1963) 1 S.C.R. 416 : A.I.R. 1962 S.C. 1711.

case to his original post of Tahsildar was *mala fide* and the reversion was by way of punishment for misconduct without complying with the provisions of Article 311 (2) of the Constitution of India. That decision did not lay down any general principle in this behalf, but the conclusion that the order was *mala fide* was arrived at having regard to the special facts and circumstances of that case.

24. The contention of Mr. S. Padmanabhan that the passing of the impugned order constituted a colourable exercise of power is connected with the allegation of *mala fides*. Once I have found against the allegation of *mala fides*, there is no scope for the contention that the passing of the impugned order constituted colourable exercise of power.

25. This takes me on to the second of the points, namely, that the impugned order constitutes punishment, that the provisions of Article 311 of the Constitution of India are applicable and that those provisions have not been complied with. It is not in dispute that the petitioners herein were appointed only temporarily as part-time Lecturers in the Law College under the provisions of Rule 10 (*a*) (*i*) of the General Rules for the Tamil Nadu State and Subordinate Services. The said Rule is as follows:

> "10. *Temporary appointments.*—(a) (*i*) (1). It is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and if there would be undue delay in making such appointment in accordance with these Rules and the Special Rules, the appointing authority may temporarily appoint a person, otherwise than in accordance with the said rules.
>
> (2) No appointment under sub-clause (1) shall ordinarily be made of a person who does not possess the qualifications, if any, prescribed for the said service, class or category. Every person who does not possess such qualifications and who has been or is appointed under sub-clause (1) shall be replaced as soon as possible by a person possessing such qualifications".

Equally admittedly under Rule 10 (*a*) (*v*) of the said rules the services of such an appointee can be terminated at any time without assigning any reason whatever. Consequently power is available to the Government to terminate the services of the petitioners as they have done in the present case. However, the learned Counsel for the petitioners contends such a termination can take place only in the course of ordinary routine administration or because of exigencies of service and the order should be one of "accident of service" as referred to by the Supreme Court in *K. H. Phadnis* v. *State of Maharashtra*[1]. The learned Counsel further contends that in this particular case, the impugned order has been passed on the basis of a demi-official letter dated 11th April, 1973 sent by the second respondent herein to the first respondent and that consequently if that demi-official letter contained any remarks adverse against the petitioners herein, they should have been given an opportunity to defend themselves and that in that sense Article 311 of the Constitution of India has been violated. The further contention is that the matter is one of substance and not of form and simply because the impugned order in the present case merely states:

> "The services of the following candidates who were appointed temporarily under rule 10 (*a*) (*i*) of the General Rules for the Tamil Nadu State and Subordinate Services as Part-time Lecturers in the Law College, Madras are terminated with effect from the date of relief:
>
> 1. Thiru V. Selvaraj.
>
> 2. Thiru S. Sankararamakrishnan".

it cannot be held that the impugned order constitutes termination or discharge simpliciter of the petitioners herein; and that if that order is taken into account along with the demi-official letter of the second respondent, it will clearly show that the order is one of punishment and that therefore Article 311 of the Constitution of India has been violated.

26. Before I deal with the above contention, I shall dispose of the other contention of Mr. S. Padmanabhan that Rule 10 (a) (*v*) itself is unconstitutional. I am of the opinion that there is no substance in such a contention. A person

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1. A.I.R. 1971 S.C. 998.

is appointed temporarily under Rule 10 (*a*) (*i*), when the post in question cannot be filled in accordance with the rules prescribed therefor and very often unqualified persons are appointed temporarily till qualified persons are available and therefore by the very terms of the appointment, such a temporary appointment is capable of being terminated at any time without assigning any reason. Once the petitioner in W. P. No. 5564 of 1973 got himself appointed only under Rule 10 (*a*) (*i*) of the General rules for the Tamil Nadu State and Subordinate Services, it is not open to him to contend that the other part of the rule, namely Rule 10 (1) (*v*) should not be applied to him. The very temporary character of the appointment involves and implies the inevitable and necessary consequence of the said appointment being terminated at any time without assigning any reason therefor. Further, the decision of the Supreme Court in *Champaklal Chimanlal Shah* v. *The Union of India*[1], lends support to this conclusion of mine. In that case, an argument was advanced that Rule 5 of the Central Services (Temporary Service) Rules, 1949, was unconstitutional, as hit by Article 16 of the Constitution of India and the said argument was rejected by the Supreme Court. The said Rule was:

> "(*a*) the service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant.
>
> (*b*) The period of such notice shall be one month, unless otherwise agreed to by the Government and by the Government servant:
>
> Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances, at the same rates at which he was drawing them, immediately before the termination of his services for the period of the notice or as the case may be, for the period by which such notice falls short of month or any agreed longer period'

Dealing with the contention advan before it, the Supreme Court poir out:

> "These rules show that there are classes of employees namely, (i)] manent employees and (*ii*) tempoı employees, the latter being divi into two sub-clauses (*a*) quasi-] manent, and (*b*) temporary. It well-recognised that the Governm may have to employ temporary : vants to satisfy the needs of a pa cular contingency and such empl ment should be perfectly legitim: There can also be no doubt, if suc class of temporary servants, could recruited that there would be notl discriminatory or violative of eq opportunity if the conditions of vice of such servants are differen some respects from those of permar employees. ....
> But we fail to see how the rule wł applies to one class of Governm servants in the matter of terminat but does not apply to the other classes can be said to violate equa of opportunity provided in Article The classification of Government vants into these classes is reason: and differences in the matter of mination of service between tl classes cannot be said to be discri natory in the circumstances. In pa cular the very fact that the servic a Government servant, is purely ten rary makes him a class apart from tl in permanent service and such Gov ment servant cannot necessarily cl all the advantages which a permar servant has in the matter of securit service".

Therefore, in my opinion, there is substance in this contention of Padmanabhan. Further, it is well-set that a discretionary power is not ne sarily discriminatory.

27. With regard to the main conten based on Article 311 of the Constitu of India, it is needless to cite author for the proposition that whenever an o of termination affecting the service Government servant is passed, and said Government servant challenges

1. (1964) 5 S.C.R. 190: A.I.R. 1964 S.C. 1854.

not a matter really of form
ıbstance. As I have pointed
in this case, the second res-
ein has sent a demi-official
11th April, 1973 to the first
herein and the petitioners'
that a copy of the said demi-
r was not served on them,
ond respondent has taken up
at it is a confidential com-
sent by him in his official
that the petitioners are not
copy of the same. I have
to the fact that the file of the
ent containing the original
letter sent by the second
ıerein as well as the office
second respondent have been
efore me. That demi-
makes recommendations in
ır Lecturers of the Law Col-
m the petitioners are two.
to the petitioners, the second
expressed his opinion that
nd conduct as Lecturers in
lege had not been satisfactory.
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the post itself is temporary and
when the post itself is abolished, automatically the appointment itself is terminated. It may be that the post is permanent and temporary appointment is made till permanent arrangements are made to fill up the post and therefore when the permanent arrangements are made, the temporary appointment is terminated. It may be that even before permanent arrangements are made, if a particular person appointed temporarily is found unsuitable to hold the post, his services can be terminated. In this particular case, as I have pointed out already, the second respondent had communicated to the first respondent about his (second respondent's) assessment of the suitability of the petitioners herein to continue in the posts of part-time Lecturers in the Law College and in his opinion they were unsuitable. The termination of the services of the petitioners on such a basis cannot be said to be one by way of punishment or one which involves a stigma and therefore it attracts the application of Article 311 of the Constitution of India.

29. A temporary Government servant occupies a peculiar position. Though Article 311 of the Constitution of India applies both to permanent Government servants and temporary Government servants, in its application to a temporary Government servant, the incidence of his office cannot be ignored. The Supreme Court in more than one decision has considered the case of temporary Government servants and has pointed out the peculiar features present in their case, starting from its decision in *Parshottam Lal Dhingra* v. *Union of India*[1].

30. In *Jagdish Mitter* v. *The Union of India*[2], Supreme Court observed:

> "It is thus clear that every order terminating the services of a public servant who is either a temporary servant, or a probationer, will not amount to dismissal or removal from service within the meaning of Article 311. It is only when the termination of the public servant's services can be shown to have been ordered by way of punishment that it can be characterised either as dismissal or removal from service.

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1. 1958 S.C.J. 217: 1958 S.C.R. 828: (1958) 1 Lab.L.J. 545: A.I.R. 1958 S.C. 36.
2. A.I.R. 1964 S.C. 449 at 452.

* * * * *

It is true that the tenure held by a temporary public servant or a probationer is of a precarious character. His services can be terminated by one month's notice without assigning any reason either under the terms of contract which expressly provide for such termination or under the relevant statutory rules governing temporary appointments or appointments of probationers. Such a temporary servant can also be dismissed in a punitive way; that means that the appropriate authority possesses two powers to terminate the services of a temporary public servant; it can either discharge him purporting to exercise its power under the terms of contract or the relevant rule, and in that case, it would be a straightforward and direct case of discharge and nothing more; in such a case, Article 311 will not apply. The authority can also act under its power to dismiss a temporary servant and make an order of dismissal in a straightforward way; in such a case, Article 311 will apply.

This simple position is sometimes complicated by the fact that even while exercising its power to terminate the services of a temporary servant under the contract or the relevant rule, the authority may in fairness enquire whether the temporary servant should be continued in service or not. It is obvious that temporary servants or probationers are generally discharged, because they are not found to be competent or suitable for the post they hold. In other words, if a temporary servant or a probationer is found to be satisfactory in his work, efficient, and otherwise eligible, it is unlikely that his services would be terminated, and so before discharging a temporary servant, the authority may have to examine the question about the suitability of the said servant to be continued and acting *bona fide* in that behalf, the authority may also give a chance to the servant to explain, if any complaints are made against him, or his competence or suitability is disputed on some grounds arising from the discharge of his work; but such an enquiry would be held only for the purpose of deciding whether the temporary servant continued or not. There is of punitive proceedings i enquiry; the idea in holdi enquiry is not to punish th servant but just to decide deserves to be continued i not. If as a result of such the authority comes to th that the temporary servan able to be continued, it simple order of discharge b the powers conferred on contract or the relevant ru case it would not be o temporary servant to inv tection of Article 311 for reason that the enquiry mately led to his dischar only for the purpose of deci the power under the con relevant rule should be e the temporary servant disc

As pointed out by the Supre the above decision itself, it has by the decisions of the Sup that the motive operating in t the authority in terminating of a temporary servant doe the character of the termin not material in determinin character. To emphasise t the Supreme Court observed:

> "Take a case where the initiates a formal departmen against a temporary servant, the enquiry is pending, it view that it may not be n expedient to terminate the the temporary servant an order of dismissal him. In order to avoid im stigma which an order of necessarily implies, the e stopped and an order of simpliciter is served on th On the authority of the decis Court in the case of *Parsh Dhingra*[1], it must be held termination of services of the servant which in form and in is more than his discharg under the terms of contra relevant rule, cannot, in law,

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1. 1958 S.C.J. 217 : 1958 S.C.R. 82 1958 S.C. 36.

ded as his dismissal, because, the appointing authority was actuated by the motive that the servant did not deserve to be continued for some alleged misconduct. That is why in dealing with temporary servants against whom formal departmental enquiries may have been commenced but were not pursued to the end, the principle that the motive operating in the mind of the authority is immaterial, has to be borne in mind".

31. The above view was reiterated by the Supreme Court in *Champaklal Chimanlal Shah* v. *The Union of India*[1], where the Court observed that "the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule is irrelevant".

32. It is in view of these peculiar features of temporary Government servants alone that the Supreme Court in *Jagdish Mitter* v. *The Union of India*[2], referred to already pointed out:

"It would thus be noticed that the problem raised by complaints made by temporary public servants who have been discharged, presents several facts, and in dealing with one fact or the other presented to the Court by the special facts in each case, emphasis has naturally shifted".

With reference to this position alone, the Supreme Court examined its earlier decisions with regard to temporary servants in that case. In dealing with the *State of Bihar* v. *Gopi Kishore Prasad*[3], the Supreme Court pointed out that the order of discharge in terms referred to considerations which showed why the Government treated the probationer as corrupt and therefore unsuitable for the post he held on probation. In view of that the Supreme Court held that the Government servant was discharged because the Government had on an enquiry come to the conclusion, rightly or wrongly that he was unsuitable for the post he held on probation, that on the face of the order, a stigma was attached to him and therefore Article 311 of the Constitution

1. (1964) 5 S.C.R. 190 : A.I.R. 1964 S.C. 1854.
2. A.I.R. 1964 S.C. 449.
3. A.I.R. 1960 S.C. 689.

would apply. Sinha, C J., who spoke for the Court in that case summarised the effect of the decision of the Supreme Court in *Parshottam Lal Dhingra* v. *Union of India*[1], by formulating the following five propositions:—

"1. Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.

2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.

3. But, if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case he is entitled to the protection of Article 311 (2) of the Constitution.

4. In the last mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 311 (2) of the Constitution and will therefore, be liable to be struck down.

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his mis-

1. 1958 S.C.J. 217 : A.I.R. 1958 S.C. 36.

conduct, or inefficiency, or some such cause".

With reference to the third of the above propositions, the Supreme Court found it necessary to explain its scope in *Jagdish Mitter* v. *The Union of India*[1]. The Supreme Court in that case observed:

"It would be noticed that these propositions were laid down in a case where the order of discharge on its face attributed stigma to the probationer whose services were discharged and it was preceded by an enquiry held with a view to decide whether the said probationer's services should not be terminated forthwith; and so, with respect, in appreciating the effect of the proposition as enunciated in the judgment, these material facts must be borne in mind. We do not think that the Court intended to lay down a broad and unqualified proposition that wherever any kind of enquiry is held by the authority before terminating the services of a probationer, the subsequent termination of such a probationer's services in whatever form it is couched must always be deemed to amount to his dismissal. As we have already indicated, almost in every case where the question of continuing the probationer or a temporary servant falls to be decided by the authority, the authority has necessarily to enquire whether the said probationer or temporary servant deserves to be continued and that may sometimes lead to an enquiry........ Such an enquiry is actuated solely by the desire to decide the simple question as to whether the temporary servant or the probationer should be continued or not, and is undertaken for that purpose alone without any desire to attach any stigma to him. An enquiry of this character must be distinguished from the formal departmental enquiry where charges are served on the servant and which is undertaken for the purpose of punishing him, otherwise it would lead to this anomalous result that in the case of a temporary servant or a probationer, the authority must discharge him without enquiring into his alleged inefficiency or unsuitability but if the authority chooses to act fairly and makes some kind of enquiry and gives an opportunity to the servant concerned to explain his alleged deficiency, the discharge becomes dismissal. We have no doubt that in laying down the third proposition, this Court did not refer to such informal enquiries and did not intend to take in cases of simple and straightforward discharge of temporary servants which follow such informal enquiries".

1. A.I.R. 1964 S.C. 449 at 454.

33. The abovesaid five propositions were restated by the Supreme Court in *The State of Punjab and another* v. *Sukha Raj Bahadur*[1], as follows:

"1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full scale departmental enquiry envisaged by Article 311 *i.e.*, an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article".

The above propositions were followed by the Supreme Court in the *State of Bihar and others* v. *Shiva Bhikshuk Mishra*[2].

1. (1969) 1 S.C.J. 51 : (1968) 3 S.C.R. 234 : A.I.R. 1968 S.C. 1089.
2. (1971) 2 S.C.J. 68 : (1971) 2 S.C.R. 191 : A.I.R. 1971 S.C. 1011.

34. *The State of Orissa and another* v. *Ram Narayan Das*[1], dealt with a case of a Sub-Inspector of Police in the Orissa Police force, who had been discharged. Rejecting the contention of the discharged Government servant that the order amounted to dismissal, the Supreme Court came to the conclusion that the impugned order of discharge could not properly be held to be an order of dismissal. Such a conclusion was arrived at notwithstanding the fact that the impugned order of discharge did refer to the adverse notes made against the probationer's conduct and did say that it was therefore no good to retain him further in service and that *prima facie* would amount to attaching a stigma to the petitioner who was discharged.

35. In *Madan Gopal* v. *The State of Punjab and others*[2], the termination of the services of a temporary employee was challenged. The facts showed that he was served with a charge-sheet alleging that he had received illegal gratification and he had demanded illegal gratification. After the concerned Government servant submitted his explanation an enquiry was conducted and the Enquiry Officer made his report in which a finding was made against the temporary employee in regard to the charge that he had received illegal gratification. The Officer who held the enquiry found the Government servant guilty of the charges and recommended his removal. It is thereafter an order passed terminating the Government servant's services forthwith and informing him that in lieu of notice he would get one month's pay as required by the Rules. In that case, though the order in form purported to be one of discharge, the Deputy Commissioner who issued the order in terms indicated that he agreed with the Enquiry Officer's finding that the Government servant concerned had accepted bribes. In that context, the Supreme Court held that the order was punitive in nature and consequently Article 311 of the Constitution was attracted.

36. As far as the facts of the present case are concerned, no charge was framed against the petitioners, no imputation was made against them and no enquiry was conducted. The termination order, apart from referring to the two Government orders under which the petitioners were temporarily appointed as part-time Lecturers in the Madras Law College referred to the demi-official letter, dated 11th April, 1973 sent by the second respondent to the first respondent. Solely on the basis of this demi-official letter in which the second respondent has expressed his opinion about the suitability of the petitioners herein to be continued as part-time Lecturers in the Law College and his recommendation with reference to the petitioner herein, it cannot be contended that the order is punitive in nature. It is admitted that the impugned order issued by the Government is an order of discharge simpliciter. As I have pointed out already, one of the circumstances in which the services of a temporary Government servant can be terminated is, when that temporary Government servant is found unsuitable to continue in office. In this particular case, the second respondent herein is the Head of the Law College and he is the competent person to observe the performances of the petitioners herein, and to form an opinion about their efficiency and suitability as part-time Lecturers. In that capacity, if the second respondent had expressed his opinion to the first respondent and sought the orders of the first respondent, it cannot be contended that any stigma is attached to the petitioners and therefore the order is punitive in character. Excellence of academic qualification cannot be the sole criterion for capacity to function as a successful Lecturer, since a Lecturer must possess the capacity to teach and communicate to the students and also the capacity to control the students. If a particular person temporarily appointed as a Lecturer in the Law College does not possess or exhibit these qualities, certainly it is open to the respondents herein to terminate the services of such a Lecturer on that ground and such a termination cannot be said to be a punishment with a stigma so as to attract Article 311 of the Constitution of India. This conclusion I am reaching treating the matter not simply as one of form but also as one of substance, in the light of the proposition referred to by the Supreme Court in *Jagadish Mitter*

1. (1961) 1 S.C.J. 209 : (1961) 1 S.C.R. 606 : A.I.R. 1961 S.C. 177.
2. (1963) 2 S.C.J. 185 : A.I.R. 1963 S.C. 531.

v. *The Union of India*[1], that "in dealing with the complaints made by public servants against their discharge from public service, what matters is not the form of the order by which their services are terminated but the substance of it." That is the reason why I have referred to the demi-official letter of the second respondent as well as one of the circumstances in which the services of a temporary Government servant can be terminated, namely, unsuitability of the Government servant concerned.

37. Mr. Vasantha Pai, in this connection invited my attention to the decision of the Supreme Court in *The State of Bihar and others* v. *Shiva Bhikshuk Mishra*[2]. The Supreme Court in that case extracted the following observation of its in its judgment in *Union of India* v. *R.S. Dhaba, Income-tax Officer, Hoshiappur*[3] :

"The test for attracting Article 311 (2) of the Constitution in such a case is whether the misconduct or negligence is a mere motive for the order of reversion or termination of service or whether it is the very foundation of the order of termination of service of the temporary employee (see the decision of this Court in *Champaklal Chimanlal Shah* v. *The Union of India*[4]. In the present case, however, the order of reversion does not contain any express words of stigma attributed to the conduct of the respondent and, therefore, it cannot be held that the order of reversion was made by way of punishment and the provisions of Article 311 of the Constitution are consequently attracted."

After extracting the above passage, the judgment proceeded to state:—

"We are unable to accede to the contention of the appellant that the ratio of the above decision is that so long as there are no express words of stigma attributed to the conduct of the Government officer in the impugned order it cannot be held to have been made by way of punishment. The test as previously laid and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. In *Dhaba's case*[1] it was not found that the order of reversion was based on misconduct or negligence of the officer. So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct (see *S.R. Tewari* v. *District Board Agra*[2]). It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

Mr. Vasantha Pai's contention is that in this particular case, the opinion of the second respondent expressed in the demi-official letter referred to in the impugned order of termination is not a mere motive for the order in question but is the very foundation itself and consequently the impugned order is by way of punishment, attracting Article 311 of the Constitution of India. I am unable to accept this argument. In the first place, as pointed out by the Supreme Court in *Champaklal Chimanlal Shah* v. *The Union of India*[3], already referred to, whether the termination of services of a temporary Government servant would

1. A.I.R. 1964 S.C. 449.
2. (1971) 2 S.C.J. 68 : A.I.R. 1971 S.C. 1011.
3. C.A. No. 880 of 1966 dated 7th April, 1969.
4. (1964) 5 S.C.R. 190 : A.I.R. 1964 S.C. 1854.

1. C.A. No. 882 of 1966, dated 7th April, 1969.
2. (1964) 3 S.C.R. 55 : A.I.R. 1964 S.C. 1680.
3. (1964) 5 S.C.R. 190 : A.I.R. 1964 S.C. 1854.

amount to dismissal or removal within the meaning of Article 311 (2) would depend upon facts of each case and the action taken by Government which finally leads to the termination of service. In this case, as I have pointed out already, there has been no levelling of charge, no imputation of misconduct and no enquiry against the petitioners herein and the order of termination in form is an order of discharge simpliciter and there are absolutely no circumstances to warrant the applicability of Article 311 of the Constitution of India. Secondly, in the case of private individuals, motive for passing such an order may be in the mind of the individual concerned. However, in the case of a Government, which is an impersonal body, it has to act through its Ministers and officers and therefore motive can be found only in the notings or the remarks of a particular officer or in the correspondence that passed between the different officers; and therefore it has necessarily to be a matter of record. Consequently when that motive finds a place in the records of the Government and a reference has been made to such a record, it is not possible to hold that the non-suitability of the Government servant concerned was the very foundation of the order and did not constitute a motive for the passing of the order. As a matter of fact, here again for the purpose of distinction between motive and foundation, what can be more relevant is the allegation of misconduct against the Government-servant concerned rather than the expression of opinion about his suitability to continue to hold the post he holds.

38. On the other hand, the learned Advocate-General, who appears for the respondents, placing reliance on certain observations of the Supreme Court in *Jagdish Mitter* v. *The Union of India*[1], already referred to and in the latest reported case of the Supreme Court on the point, namely, *The State of U.P.* v. *Shyam Lal Sharma*[2], contends that for the purpose of finding out whether the order is one of simple discharge or is one of punishment, the Court should look only into the terms of the order and should not delve into the files of the Secretariat. In the former case, the Supreme Court observed:

> "That is why the form of the order is inconclusive. It is the substance of the matter which determines the character of the termination of services. In dealing with this aspect of the matter, we must bear in mind that the real character of the termination of services must be determined by reference to the material facts that existed prior to the order. Take a case where a temporary servant attacks the validity of his discharge on the ground of *mala fides* on the part of the authority. If in resisting the plea of *mala fides*, the authority refers to certain facts justifying the order of discharge and these facts relate to the misconduct, negligence or inefficiency of the said servant, it cannot logically be said that in view of the plea thus made by the authority long after the order of discharge, it should be held that the order of discharge was the result of the considerations set out in the said plea. What the Court will have to examine in each case would be, having regard to the material facts existing up to the time of discharge, is the order of discharge in substance one of dismissal? If the answer is that notwithstanding the form which the order took, the appointing authority, in substance really dismissed the temporary public servant, Article 311 would be attracted."

39. However, the decision more in point is the latter decision relied on by the learned Advocate-General. In that case, a Government servant was compulsorily retired by an order dated 28th March, 1962. But that order itself referred to a letter dated 16th March, 1962 of the Deputy Superintendent of Police, Head Quarters, signed "for Inspector General of Police, U.P.". That letter dated 16th March, 1962 in turn referred to a letter dated 14th February, 1962 addressed to the Deputy Inspector-General of Police, Agra Range, U.P., in which it was stated that the Government servant concerned, had lost his utility to the Department and he was considered to be a bad lot, incorrigible, and no longer useful and therefore his compulsory retirement was recommended. Thus, it will be seen that the reference to the Government servant

1. A.I.R. 1964 S.C. 449.
2. (1972) 1 S.C.R. : 184 A.I.R. 1971 S.C. 2151.

concerned having lost his utility to the Department and he being considered to be a bad lot, incorrigible and no longer useful did not find a place in the actual order of compulsory retirement; nor did it find a place even in the letter dated 16th March, 1962 referred to in the order of compulsory retirement, but only in the letter which was referred to in the letter dated 16th March, 1962. It is in that context, an argument was advanced before the Supreme Court that the order in question was not a simple order of discharge but one of dismissal attaching a stigma to the Government servant concerned. The Supreme Court pointed out that the order of compulsory retirement cannot be said to sustain the plea of punishment by extracting opinions expressed by the authorities in regard to the officer in the past. The Court proceeded to state:

"The ruling in *Saksena's case*[1], is also that where there are no words in the order of compulsory retirement which throw any stigma there should not be any inquiry into Government files to discover whether any remark amounting to stigma could be found in the files. The reason is that it is the order of compulsory retirement which alone is for examination. If the order itself does not contain any imputation or charge against the officer the fact that 'considerations of misconduct or misbehaviour weighed with the Government in coming to its conclusion whether any action could be taken under rule 278 does not amount to any imputation or charge against the officer'. This was the view expressed by this Court in *Dalip Singh's case*[2]. In that case the relevant rule was as follows:—

'The State reserves to itself the right to retire any of its employees on pension on political or on other reasons'.

Where the authorities can make an order of compulsory retirement for any reason and no reason is mentioned in the order it cannot be predicated that the order of compulsory retirement has an inherent stigma in the order."

1. (1967) 2 S.C.R. 496: A.I.R. 1967 S.C. 1264.
2. (1961) 1 S.C.R. 88 : (1961) 2 S.C.J. 58 : A.I.R. 1960 S.C. 1305.

The observation of the Court in *Saksena's case*[1] referred to above was more explicit, when it stated:

"Where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order will amount to removal within the meaning of Article 311. But where there are no express words in the order we cannot delve into Secretariat files to discover whether some kind of stigma can be inferred on such research."

These observations of the Supreme Court certainly support the contention of the learned Advocate-General that it is the impugned order alone that is for examination in the present case and that so long as that order does not contain any express words attaching any stigma to the Government-servants concerned, the Court cannot go behind that order to examine the files for the purpose of finding out whether some kind of stigma was contemplated or not.

40. However, Mr. Vasantha Pai, contends that these observations were made in relation to an order of compulsory retirement which stands apart and that therefore those observations cannot be applied to a case relating to termination of services of temporary Government servants. I am unable to accept this distinction sought to be made by the learned Counsel. In the first place, the Supreme Curt in the *State of U.P.* v. *Shyam Lal Sharma*[2] referred to above has referred to its judgment in *Jagdish Mitter* v. *The Union of India*[3], which was a case of termination of services of a tempo. a y Government servant. Secondly, there is a very close analogy between compulsory retirement of a Government-servant and termination of service of temporary Government-servant. In both the cases, the services of the Government servants concerned are put an end to. In both the cases, such termination of the services of the Government-servants are brought about by the exercise of power conferred on the authorities either under the terms of the contract or under the rules applicable to them—in one case by virtue of the provisions contained in the rules

1. (1967) 2 S.C.R. 496: A.I.R. 1967 S.C. 1264.
2. (1972) 1 S.C.R. 184 : A.I.R. 1971 S.C. 2151.
3. A.I.R. 1964 S.C. 449.

relating to temporary appointments and in the other by virtue of the rules reserving to the Government a power to compulsorily retire a Government servant, after he has put in a certain number of years' service. In both the cases the question that has been agitated and which came up for consideration before the Courts was, whether the orders complained of were passed in exercise of such powers conferred on the authorities concerned under the contract or the rules or were really by way of punishment.

41. Notwithstanding this legal position, I have in this particular case considered the circumstances attending the passing of the impugned order and come to the conclusion that the same was not by way of punishment and therefore Article 311 of the Constitution of India is not attracted.

42. That leaves the last of the points urged on behalf of the petitioner, namely, that the impugned order is discriminatory and therefore is violative of Articles 14 and 16 of the Constitution of India. In paragraph 8 of the affidavit filed on behalf of the petitioner in the former writ petition the petitioner has averred:—

> "I have been arbitrarily picked out from among other temporary part-time Lecturers even though there are more than 15 of them who are junior to me and who do not possess even the prescribed minimum qualification for a part-time Lecturer. Therefore the termination of my service is violative of Article 16 of the Constitution of India."

The second respondent in his counter-affidavit in paragraph 9 dealing with this allegation has stated:

> "There is no arbitrary exercise of power in terminating the petitioner among the persons who are holding posts temporarily. The contention based upon the possession of the required qualification would not be relevant since the rules framed under Article 309 of the Constitution namely the Tamil Nadu State and Subordinate Service Rules confer power to make appointments on temporary basis even though the persons do not possess the minimum qualification. Further as among the persons who are so appointed on temporary basis, if the services of one are terminated as per the provisions of rules, the claim based upon Article 16 of the Constitution would not be maintainable. The capacity to teach and the capacity to control the students is an important requirement of a lecturer which is not dependent only upon academic qualifications. The conduct and character of a lecturer is also taken into account because he has to be a model to the students in cultivating right trends and behaviour. It is for the head of the institution to determine the suitability of lecturers and terminate the services of these who do not come up to the required level in spite of their academic qualifications. The power of termination of service has therefore been exercised in this instant case in a fair and reasonable manner and the allegation of arbitrariness is therefore devoid of merits."

Thus, according to the second respondent, the services of the petitioner in W.P. No. 5454 of 1973 were terminated since he did not possess the necessary capacity to teach and control the students and consequently there was no arbitrariness. However, the independent counter-affidavit filed on behalf of the first respondent does not deal with this allegation of the petitioner at all. The only paragraph in the short counter-affidavit which deals with the order terminating the services of the former petitioner is paragraph 2 and the same is as follows:—

> " The petitioner had been appointed temporarily under rule 10 (2) (1) of The General Rules for the Tamil Nadu State and Subordinate Service and his services can therefore be terminated at any time without assigning any reasons. The impugned order of termination of services is thus in accordance with the rules".

Thus, it will be seen that the first respondent, apart from putting forward the contention that under the rules the power to terminate the services of a person was available to the first respondent and in the instant case the services of the petitioner were terminated in accordance with the said rules, did not traverse the allegation put forward by the peti-

tioner in the former writ petition that he has been arbitrarily picked out from out of the temporary part-time Lecturers, even though there are more than 15 of them who are junior to the petitioner and who did not possess even the prescribed minimum qualifications for a part-time Lecturer and that consequently the impugned order is violative of Article 16 of the Constitution of India.

43. The situation is more explicit with regard to the case of the petitioner in the latter writ petition. In paragraph 22 of the affidavit filed by the petitioner in that writ petition, he has set out several grounds for challenging the impugned order as violative of Articles 14, 16, 19 (1) (*g*) and 311 of the Constitution of India. In ground No. 1 he alleges that the impugned order is discriminatory, in that it is violative of Articles 14 and 16 of the Constitution of India. In ground No. 3, the averment is that the petitioner has been arbitrarily picked out from among other temporary part-time lecturers and his services terminated. Ground No. 4 is:—

> "The petitioner was appointed in November, 1971. On the date of the termination of his service by the impugned order the petitioner possessed the maximum qualification prescribed under the Rules for the post of part-time Lecturer. Subsequent to the appointment of the petitioner persons such as M/s. Balakrishnan, K M. Natarajan, Bhaskaran, Sungundaraj, Francis Rajan, Hassam Mohideen Abdul Kalam, Jayaram, P. L. Venkataraman and others have been appointed. None of them holds M.L. degree of the Madras University. Apart from that they do not possess the qualification prescribed under the Rules and they have also put in less service than the petitioner. In the circumstances the picking out of the petitioner and the termination of his services is clearly an act of discrimination and personal differentiation between the petitioner on the one hand and the other part-time lecturers on the other in the matter of service under the State. In other words the termination of the services of the petitioner is a negation of the right of the petitioner of equal access to employment or opportunities to any office under the State".

44. As I have pointed out already, an elaborate counter-affidavit has been filed by the second respondent in this writ petition. This counter-affidavit purports to have been filed on behalf of the second respondent only. However in the body of the counter-affidavit, the second respondent speaks for himself as well as for the first respondent also. Referring to the above allegations of the petitioner contained in his affidavit the second respondent states in paragraph 19 of his counter-affidavit as follows:

> "The allegations in paragraph 22 (3) of the affidavit that the petitioner has been arbitrarily picked out from among other temporary part-time Lecturers and his service has been terminated, is not correct. The question whether the petitioner should be continued in service with regard to the suitability, is a matter which the respondents have to decide and they decided it on a fair assessment of the petitioner's performance as a Lecturer and decided that he need not be continued as a Lecturer. Such a decision was taken by the respondents fairly and not arbitrarily. The petitioner is not similarly placed like the other Lecturers in his performance as Lecturer."

In paragraph 20 of the counter-affidavit, the second respondent states:—

> "The allegation in paragraph 22 (4) of the affidavit that the petitioner possessed the maximum qualification prescribed under the rules for the post of a part-time Lecturer, is misleading. It is not by mere academic qualification like attaining the M. L. Degree that one can say that he is best suited person to be a Lecturer in the Law College. Mere academic attainment would not necessarily make an efficient Lecturer. The petitioner has given a list of persons who even though appointed temporarily, are retained in the Law College as Lecturers and states since his services have been terminated there has been a discrimination. It is respectfully submitted for the reasons stated above that there has been no invidious discrimination and each case was judged on its own merits.".

Thus, it will be seen that the case of the second respondent, is that both the second

respondent and the first respondent decided that the petitioner herein did not have the necessary capacity to function successfully as a lecturer in the Law College, that it is on the basis of this assessment of theirs of the performance of the petitioner herein as a lecturer, his services were terminated and that therefore there was no discrimination as between the different part-time Lecturers as alleged by the petitioner herein.

45. However, the short counter-affidavit filed on behalf of the first respondent states the following on this aspect in paragraph 2 :

> "As regards the allegations in paragraph 22 (5) of the affidavit I am to state that it is true that the impugned order does not disclose any reason for the termination of the service of the petitioner. In so far as the petitioner's averment that the impugned order refers to the confidential D.O. letter, I am to state that I was not in any manner influenced by the contents of the D.O. letter, since, the petitioner being a temporary employee, there was no need to assign any reason and much less to go into the contents of the D.O. letter. It happened to be cited in the impugned order since it formed part of the file."

In view of this express statement contained in the counter-affidavit filed on behalf of the first respondent, Mr. S. Padmanabhan, contends that there is a vital discrepancy between the counter-affidavit filed by the second respondent and that filed by the first respondent in this behalf and that itself shows that the impugned order has not been a fair or straight one. In my opinion, undoubtedly there is a discrepancy. But certainly that discrepancy will not support the case of the petitioner that the impugned order has not been a fair and straight one. It may be that as the second respondent has sent a demi-official letter to the first respondent and the impugned order has referred to the said demi-official letter, the second respondent assumed that the first respondent had accepted the opinion expressed by the second respondent in his demi-official letter and acted on the same and therefore he has stated in the counter-affidavit that both the respondents terminated the services of the petitioner herein on their assessment of the performance of the petitioner as lecturer in the Law College.

46. However, one crucial thing still remains, namely, the first respondent herein has not at all traversed or denied the allegation made by the petitioner in the affidavit which I have already extracted, namely, that the petitioner has been singled out among the temporary part-time Lecturers and his services have been terminated arbitrarily and that there are part-time Lecturers appointed subsequent to the petitioner herein, who are less qualified than the petitioner himself.

47. Whatever might have been the stand of the second respondent, it is for the first respondent to explain the circumstances under which the services of the petitioners were terminated when the petitioners had alleged that they were discriminated against and were picked out from among the several part-time Lecturers for this arbitrary termination, because it is the first respondent who passed the order in question and who had the power to pass the order. Admittedly the posts have not been absolished. Equally admittedly regular appointments to the said posts have not been made. Consequently, if the petitioners' services were terminated, they could have been terminated only on the basis that they were found unsuitable to continue to hold the post of part-time Lecturer. The first respondent has expressly stated in the counter-affidavit that the deponent to the counter-affidavit was not at all influenced by the contents of the demi-official letter sent by the second respondent and as a matter of fact, he went to the extent of saying that there was no need to assign any reason in the order and much less to go into the contents of the letter. That means, the first respondent had not terminated the services, of the petitioner in the latter writ petition for the reasons mentioned by the second respondent in his confidential demi-official letter. Since the same demi-official letter of the second respondent mentions about both the petitioners and since under the same order the services of both the petitioners have been terminated, it could not be that the deponent of the counter-affidavit filed on behalf

of the first respondent did not look into the contents of the said demi-official letter and was not influenced by the same with regard to the petitioner in the latter writ petition, but did look into the said contents and was influenced by the same with regard to the petitioner in the former writ petition. Hence, it follows that with regard to both the petitioners, the first respondent did not look into the contents of the said demi-official letter and was not influenced by the same. Consequently, the conclusion is irresistible that the allegation made by the petitioners in both the writ petitions that they have been singled out for arbitrary treatment as among several temporary part-time Lecturers stands unrebutted.

48. Hence, even though I have held that the impugned order is not *mala fide*, that it does not attract Article 311 of the Constitution of India, and that the first respondent has the power to terminate the services of the petitioners herein on the ground that they were found unsuitable to hold the post, without following the procedure prescribed in Article 311 of the Constitution of India, still I have to allow these writ petitions and quash the impugned order on the sole ground that the allegation of the petitioners in both the cases that they have been singled out and arbitrarily dealt with as among the several part-time Lecturers in the Law College has not been refuted by the first respondent by placing before the Court the circumstances under which the first respondent happened to pass the impugned order: and with regard to the petitioner in the latter writ petition the first respondent went a step further and positively stated that the deponent of the counter-affidavit was the officer who passed the order and that he was not at all influenced by the contents of the demi-official letter dated 11th April, 1973 of the second respondent, thereby making it clear that the first respondent had no reason whatever to single out the petitioner therein for the purpose of terminating his services.

49. Under these circumstances, both these writ petitions are allowed and the order of the first respondent dated 17th September, 1973 terminating the services of the petitioners is quashed. There will be no order as to costs.

50. Before parting with these cases, let me permit myself the liberty of making an observation on a matter which is obvious. In the past, the lecturership of the Madras Law College was a matter of honour and recognition. Men of vast knowledge, deep learning, matchless erudition, unimpeachable integrity, fine culture and sterling character were invited and entreated to be the part-time Lecturers of the college. They with their mellifluous voice, torrential flow, appropriate and arresting language clear analysis and masterly exposition of the subject instantaneously commanded and compelled the attention, admiration, respect and obedience of the students and the question of discipline which bedevils every institution to-day was a matter of course. Their exemplary conduct and character, earnestness and quiet efficiency born out of the possession of the necessary equipment in abundance, enabled them to handle classes of hundreds of students without a hitch or ruffle. They were men and masters of superb and superlative mettle and calibre. Their very presence on the dais inspired in the students a sense of awe and respect and created an infectious and irresistible interest in and thirst for knowledge and enlightenment. Alas, it is a far cry from that to the present situation, where there is a scramble for such posts, the Government is forced to relax the rules requiring the prescribed qualifications and the Law College, probably, the only income-yielding educational institution in the State is carried on with scores of temporary members of staff. The only consolation is, if it is a consolation at all, that it is not peculiar to the Madras Law College, but is part and parcel of a general malice which has afflicted every field of activity in the country, where though there is considerable expansion horizontally, there is no corresponding development, vertically or in depth.

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT.—*K. Veeraswami, C.J. and A. Varadarajan, J.*

S. P. Munuswamy Gounder and others .. *Appellants**

v.

Erusa Gounder *alias* **S. P. C Dorai** .. *Respondent.*

Transfer of Property Act (IV of 1882)' *section* 53-A—*Suit for declaration of title—Agreement to sell—Purchaser put in possession of properties in part performance— Subsequent sale by vendor to other purchasers—Trespass by subsequent purchasers—Trial Court granting prayer—First appellate Court discharging the finding by Trial Court—Second Appeal—Trial Court's decree restored Letters Patent Appeal—Scope of section* 53-A *of Transfer of Property Act—Matter remitted to First Appellate Court with directions.*

Section 53-A of the Transfer of Property Act does confer some right on the transferee, if the conditions of that section were fully satisfied and what that right was is also clear from the provisions of section 53-A. The right was to have the transferor or any person claiming under him debarred from enforcing against the transferee and persons claiming under him anything in respect of the property of which the transferee had taken or continued in possession. The right could be used by the transferee always as a shield and not as an independent claim either in the capacity of plaintiff or defendant, that is to say, he could not ask for title basing his claim on the fact that he had fulfilled the conditions of section 53-A. But he could, as a shield, ask for protection of the right envisaged by section 53-A by debarring, in other words, by getting an injunction against the transferor and those claiming under him from interfering with his possession. [*Para.* 2.]

In the instant case the plaintiff claimed that pursuant to a contract for sale, the first defendant put the plaintiff in possession of the suit properties. At that time the plaintiff was a minor and the agreement was entered with the guardian. Subsequently Defendants 2 to 4 obtained a sale and attempted to trespass. Plaintiff filed a suit for declaration of title and for an injunction from interference. The trial Court found that there was an agreement for sale, that the plaintiff was put in possession and, on that basis, granted the prayers. The first appellate Court proceeded upon the view that section 53-A of the Transfer of Property Act by itself did not confer title on the plaintiff and therefore he could not rest the claim for title on the basis of part-performance As to possession, it held that the finding of the trial Court was unnecessary and discharged the finding. On second appeal, the trial Court's decree was restored. The defendants filed a Letters Patent Appeal.

Held, the proper course for the Judge sitting in second appeal was to remit the matter to the first appellate Court to find whether the trial Court's finding as to possession was justified and well founded. The learned Judge also should have satisfied himself, before restoring the first Court's judgment, that the conditions of section 53-A had been fully satisfied. [*Paras.* 3 *and* 4.]

The appeal was directed to be restored to the file of the first appellate Court and disposed of in the light of this judgment, directions given.

Case referred to:—

Achaya v. *Venkata Subba Rao*, I.L.R. (1956) A.P. 1019 : 1956 An.W.R. 830 : A.I.R. 1957 A.P. 854.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Venkatadari, dated 28th April, 1966 and passed in S.A. No. 1752 of 1962 preferred to the High Court against the decree of the Court of the Subordinate Judge, Vellore and passed in A.S. No. 170 of 1960 (O.S. No. 148 of 1958 Court of the District Munsif, Tirupattur).

R. Shanmugham, for Appellants.

R. Sundaralingam, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C. J.—The defendants appeal under the Letters Patent from a judgment

* L.P.A. No. 75 of 1966.

22th Jaunary, 197.

of Venkatadri, J., who reversed the judgment of the first appellate Court and restored the decree of the trial Court. There is no dispute that the suit properties belong to the first defendant on the basis of a purchase made by him on 31st January, 1935. He entered into a contract with one Lakshmi Ammal as the guardian of the present plaintiff and Krishnaswami who were minors, for sale of the properties to them for a consideration of Rs. 500 within two years. The suit was instituted for declaration of title and for an injunction from interference. This was on the basis that Laskhmi Ammal and the minors were put in possession of the properties in part performance of the agreement to sell the properties. Defendants 2 and 4 who were among the appellants, had obtained a sale from the first defendant and attempted to trespass. That was the case of the plaintiff. The trial Court found that there was an agreement of sale and the plaintiff had been put in possession, and, on that basis, it granted the prayers asked for in the plaint. The first appellate Court proceeded upon the view that section 53-A of the Transfer of Property Act by itself did not confer title on the plaintiff, and that, therefore, he could not rest the claim, on the basis of part performance, for title. As to possession, it considered that the finding of the trial Court, in the circumstances, was unnecessary and discharged the finding. When the matter came up in second appeal, Venkatadri, J., said:

> "After going through the documentary and oral evidence in the case, I am of opinion that the appellant continued to be in possession of the suit properties in spite of the sale in favour of defendants 2 and 3 by the first defendant".

He referred to *Achaya* v. *Venkata Subba Rao*[1], and finally held that the appeal should be allowed and the trial Court's decree should be restored.

2. It seems to us that the judgment in second appeal cannot be supported. Subba Rao, C J. (as he then was) himself observed in that case.

> "It is settled law that, under section 53-A of the Transfer or Property Act no title passes to a transferee. He cannot file a suit for declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him".

Venkatadri, J., was, therefore, not right in allowing the appeal, which would mean that he was giving declaration of title sought for. As pointed out in *Achaya* v. *Venkata Subba Rao*[1], which is representative of a large volume of judicial opinion, section 53-A of the Transfer of Property Act does confer some right on the transferee, if the conditions of that section are fully satisfied, and what is that right is also clear from the provisions of section 53-A. The right is to have the transferor or any person claiming under him debarred from enforcing against the transferee and persons claiming under him in respect of the property of which the transferee has taken or continued in possession. This right can be enforced by the transferee always as a shield and not as an independent claim either in the capacity of plaintiff or defendant: that is to say, he cannot ask for title basing his claim on the fact that he has fulfilled the conditions of section 53-A. But he can, as a shield, ask for protection of the right envisaged by section 53-A by debarring; in other words, by getting an injunction against the transferor and those claiming under him from interfering with his possession.

3. In this case, the first appellate Court had discharged the trial Court's finding as to the plaintiff's possession. No doubt, Venkatadri, J., purported to look into the oral and documentary evidence and find that the finding was correct. But, sitting as he did in second appeal, we think that the proper thing which the learned Judge should have done was to remit the matter to the first appellate Court to find whether the trial Court's finding as to possession was justified and well-founded. The learned Judge also should have satisfied himself, before restoring the first Court's judgment, that the conditions of section 53-A had been fully satisfied.

4. We, therefore, allow the appeal and direct that the appeal before the first

1. I.L.R. (1956) A.P. 1019; 1956 An.W.R. 830: A.I.R. 1957 A.P. 854.

1. I.L.R. (1956) A.P. 1019: 1956 An.W.R. 830: A.I.R. 1957 A.P. 854.

appellate Court be restored to its file and disposed of in the light of this Judgment. If the first appellate Court finds that, pursuant to the contract to sell the properties, the plaintiff had been put in possession as part performance and the other conditions of section 53-A have been complied with, then it would be justified in granting a decree to the plaintiff for injunction debarring or preventing the defendants from interfering with the plaintiff's right which has accrued to him under section 53-A including his right to be continued in possession. Costs of this appeal will abide the result.

5. This appeal having been set down this day for being mentioned in pursuance of the letter of Mr. R. Shanmugham, Advocate for the appellants dated 2nd January, 1974 and upon hearing the arguments of Mr. R. Shanmugham, Advocate for the appellants and of Mr. R. Sundaralingam, Advocate for the respondent, *the Court ordered as follows*:—

1. That in the first page of the judgment of this Court dated 24th October, 1972 and made herein for the lines 3 and 4 *viz.*, "the first appellate Court and restored the decree of the trial Court", the following be substituted:

"The Courts' below"; and

(2) That the last line in the first para of page 3 of the said judgment *viz.*; "and the trial Court's decree should be restored" be deleted.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

Subbammal .. *Petitioner**

v.

P. Gurusamy Thevar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 84, 85 *and* 86—*Execution—Court auction—Sale—Deposit of general stamps not proper—Deficiency—Application for excusing delay for deposit of stamps—Allowed by executing Court—Whether proper—Order without jurisdiction— Rules* 85 *and* 86—*Mandatory.*

In auction by the Court in three lots, there were purchasers who were third parties. The respective purchasers deposited the 25 per cent. of the purchase money in accordance with Order 21, rule 84, Civil Procedure Code. The balance of money was also deposited within fifteen days period as per rule 85 of Order 21. But, in each of the three cases, the deposit of general stamps was not proper and was deficient. Eight days after the fifteen days period prescribed in rule 85 the respective purchasers deposited the deficient stamps and also filed applications for excusing delay. The executing Court allowed the applications. The order of the executing Court was challenged.

Held: The auction-purchasers were third parties and the proviso to rule 85 of Order 21, had no application at all. In the present case, there was no question of any period being fixed or granted by the Court for the doing of a particular Act. It was the statutory provision contained in rule 85 of Order 21, which made it obligatory on the part of the auction-purchaser to deposit not only the full amount of purchase-money but also the general stamps within the prescribed period, namely, fifteen days from the date of sale. There was no provision in the Code which authorised the executing Court to extend the abovesaid period of fifteen days. On the contrary, rule 86 made it clear that if there was any default in payment within the period prescribed in rule 85, the property shall be resold and the purchaser should forfeit all claims to the property. Undoubtedly rules 85 and 86 were mandatory. The Court had no discretion in the matter. Of course, under rule 86, the executing Court was given discretion but that discretion related only to the question whether the deposit already made (under rule 84) had to be forfeited or not. In the face of the decision in *M. M. Shah* v. *Sayed Mahmad*, (1954) 2 M.L.J. (S.C.) 55 : 1954 S.C.J. 509 of the Supreme Court, the executing Court was entirely in the wrong in allowing the applications filed by the auction-purchasers. There was no provision in the Code for such extension of time. The provisions rules 84, 85 and 86 of Order 21 of the Code are mandatory and the Court had no jurisdiction to extend time.

[*Paras.* 4, 5 *and* 6.]

*C.R.P. Nos. 2679, 2680 and 2681 of 1973.
22nd January, 1974.

Cases referred to :

M. M. Shah v. *Sayed Mahmad*, (1954) 2 M.L.J. (S.C.) 55 : 1954 S.C J. 509 : (1955) 1 S.C R 108 : A.I.R. 1954 S.C. 349 ; *Venkataramiah* v. *Audinarayananath*, (1953) 2 M.L J. 177: 86 L.W. 662: A I.R. 1953 Mad 929 ; *Suryanarayana Murthi* v. *Southern Agencies*, A I.R 1962 A.P. 271 ; *Uttamchand* v. *Balakrishna*, A.I.R. 1951 Bom. 224.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Ramanathapuram at Madurai dated 22nd October, 1973 and made in E.A. No. 124 to 126 of 1973 E.P. No. 36 of 1972 in O.S. No. 116 of 1971.

K. Venkataswami, for the Petitioner.

E. Padmanabhan and *K. Ramamurthy*, for Respondents.

The Court made the following

ORDER.—These three revision petitions arise out of execution proceedings. In E. P. No. 36 of 1972 in O.S. No. 116 of 1971 on the file of the Court of the Subordinate Judge, Ramanathapuram at Madurai, three lots of properties were sold in Court-auction in pursuance of one and the same decree and the said three lots were purchased by three different third parties. The respective auction-purchasers made the deposit of 25 per cent of the purchase-money in accordance with Order 21, rule 84, Code of Civil Procedure. The balance of purchase-money was also deposited within the fifteen day period as contemplated under rule 85 of Order 21. However, in each of the three cases, the deposit of general stamps was not proper. Though general stamps had been deposited, the same was deficient in each of the three cases. Eight days after the fifteen days period prescribed under rule 85, the deficient stamps were deposited by the respective auction-purchasers and applications were filed for excusing the delay in depositing the said deficient stamps. This was opposed by the judgment-debtor but the executing Court has allowed the three execution applications filed by the auction-purchasers holding that under the circumstances of the case, the delay in the deposit of stamps had to be condoned. The three revision petitions are filed by the judgment-debtor (first defendant in the suit) challenging the decision of the executing Court in the said three applications filed by the auction-purchasers.

2. I am quite clear that the order of the executing Court in allowing the execution applications filed by the auction-purchasers is one without jurisdiction. Under rule 85 of Order 21, not only the full amount of purchase-money payable but also the general stamps for certificate (or the amount required for such stamps) shall be deposited into Court before the Court closes on the fifteenth day from the date of sale of the property. If the purchaser is the decree-holder himself, the proviso to the abovesaid Rule says, that in calculating the amount to be so paid into Court he shall have the advantage of any set-off to which he may be entitled under rule 72. However, this proviso has no application with regard to the general stamps to be deposited. Further, in this case, the auction-purchasers are third parties and therefore the proviso to rule 85 has no application at all. Thus under rule 85, the purchasers ought to have deposited the full amount of the purchase-money and also the full general stamps for certificate before the Court closes on the fifteenth day from the date of the sale of the property. Admittedly, in this case, the three auction-purchasers though have deposited the full amount of purchase-money and part of the general stamps, there was deficiency in general stamps. The deficiency came to be made up only eight days after the fifteen days period prescribed in rule 85. It would appear that the auction-purchasers had made a mistake in calculating the general stamps required for the certificate and that is how there was deficiency in the deposit of general stamps. Whatever be the reason for the deficiency, the fact remains that the requirement under rule 85 had not been fully complied with.

3 What is the effect of non-compliance of rule 85 is the question. Has the executing Court jurisdiction to extend time for depositing either the purchase-money or the general stamps ? I am quite clear that the Court has no such jurisdiction.

4. There is no dispute that section 148 of the Code of Civil Porcedure has no applictaion here. That section says that where any period is fixed or granted by the Court for the doing of any Act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period. In the present case, there is no question of any period having been fixed or granted by the Court for the doing of a particular Act. It is the statutory provision contained in rule 85 of Order 21, which makes it obligatory on the part of the auction-purchaser to deposit not only the full amount of purchase-money but also the general stamps within the prescribed period, namely fifteen days from the date of sale. There is no provision in the Code which authorises the executing Court to extend the abovesaid period of fifteen days. On the contrary, rule 86, makes it clear that if there was default in payment within the period prescribed in rule 85, the property shall be resold and the purchaser shall forfeit all claims to the property. Undoubtedly rules 85 and 86 are mandatory. The Court has no discretion in the matter. Of course under rule 86, the executing Court is given discretion but that discretion relates only to the question whether the deposit already made (under rule 84) has to be forfeited or not.

5. In *M. M. Shah* v. *Sayed Mahmad*[1], it has been held that the provisions contained in rules 84, 85 and 86 are mandatory. It is pointed out that the requirements of rule 85, should be complied with within fifteen days from the date of sale and that the said provision is mandatory. It is further pointed out that if the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit and there the discretion ends and that the obligation of the Court to resell the property is imperative. It is made clear that the non-compliance of the requirements of rule 85, results in the defaulting purchaser forfeiting all claims to the property, because of the provision in rule 86. That was a case of non-payment of the purchaser-money. But it must be remembered that under rule 85, there is no distinction between purchase-money and the general stamps. The Rule makes it clear that the full amount of the purchase-money as well as the general stamps have to be deposited within 15 days from the date of the sale of the property. Therefore, what applied to the purchase-money equally applied to the general stamps. In the case referred above, the Supreme Court has clearly held that if the requirements under rule 85 of Order 21, are not complied with within the prescribed time, then the sale is a nullity and the purchaser acquires no right at all. In the face of this decision of the Supreme Court, the executing Court is entirely in the wrong in allowing the applications filed by the auction-purchasers.

6. It purported to follow a decision of this Court reported in *Venkataramaiah* v. *Audinarayananath*[1]. That was a case where the delay in depositing the general stamps came to be condoned by consent of parties. At page 664 the Division Bench has in fact observed that if the auction-purchaser does not comply with the provisions of Order 21, rule 85, he cannot insist on the compliance with it after the lapse of fifteen days and demand that the sale in his favour should be confirmed. After making the above observation, regarding the legal position, the Division Bench pointed out that in that particular case what happened was that the sale was confirmed in accordance with the compromise between the parties and subsequently the Court condoned the delay in depositing the amount required for stamp for the certificate. Very much subsequent to that, the judgment-debtor in that case filed an application for setting aside the sale on the ground that the requirements of rule 85 had not been complied with by the auction-purchaser. The executing court held that in view of the compromise between the parties earlier, by which the Court sale came to be confirmed in spite of the default made by the auction-purchaser, it was not open to the judgment-debtor to file a fresh application to have the sale set-aside. Hence that application was dismissed. A civil revision petition taken to this Court by the judgment-debtor against the dismissal of the said appli-

1. (1954) 2 M.L.J. (S.C.) 55: 1954 S.C.J. 509 (1955) 1 S.C.R. 108 : A.I.R. 1954 S.C. 349.

1. (1953) 2 M.L.J. 177 : 66 L.W. 662 ; A.I.R. 1953 Mad. 929.

cation was also not successful. Thereafter, a suit was filed attacking the Court sale. The Division Bench ultimately held that the subject-matter of the suit was the same as in the application filed by the judgment debtor to set aside the sale, which application had been dismissed earlier, and that therefore the suit should necessarily fail. This decision certainly does not help the auction-purchasers in the present case. Even in this decision, the Division Bench has quoted with approval several earlier decisions wherein it has been held that the Court has no jurisdiction to extend the time prescribed under rule 85. It is because that the sale was confirmed in pursuance of a compromise between the parties, it had been held in that case that the judgment-debtor cannot reagitate the question that the sale was a nullity on the ground of non-compliance with rule 85. In any event, in the face of the decision of the Supreme Court which clearly holds that the sale, regarding which the requirements of rule 85 of Order 21, Code of Civil Procedure have not been complied with is a nullity the Court-auction-purchasers cannot be heard to contend otherwise. Further, in the present case, there is no question of the sale having been confirmed in spite of the non-compliance with the requirements of rule 85, and the judgment-debtor coming forward with a case at a later stage that the sale is a nullity. Here the question is whether the executing Court has jurisdiction to extend the time prayed for by the auction-purchasers. As already pointed out, there is no provision in the Code for such extension of time and a combined reading of rules 84, 85 and 86 of Order 21, Code of Civil Procedure, would make it absolutely clear that the provisions are mandatory and the Court has no jurisdiction to extend time.

7. In *Suryanarayana Murthi* v. *Southern Agencies*[1], it has been held that a sale held in execution of a decree is a nullity and has to be set aside when the amounts mentioned in Order 21, rule 85, Civil Procedure Code, are not deposited in full before the Court closes on the fifteenth day from the date of the sale of the property. That was also a case where there

1. A.I.R. 1962 A.P. 271.

was only deficiency in the deposit of general stamps. Relying on *M. M. Shah* v. *Sayed Mahmad*[1], referred to earlier, the Andhra Pradesh High Court held that the non-compliance with rule 85, in respect of the deposit of general stamps would make the sale a nullity and that the Court has no jurisdiction to extend the time fixed for the deposit. In *Uttam Chand* v. *Balkrishna*[2], it has been held that the provisions of Order 21, rule 85, as well as rule 86 are mandatory in the sense that in the event of the auction-purchaser failing to deposit the full purchase price within fifteen days from the date of the auction-sale, the Court will have no option but to order a resale of the property. It is also pointed out that the Court has no jurisdiction whatever, to extend the time for the payment of the balance of the purchase price as fixed under Order 21, rule 85. As I said earlier, what applied to the purchase price equally applied to general stamps.

8. The result is all the three revision petitions are allowed and E.A. Nos. 124 125 and 126 of 1973 in E.P. No. 36 of 1972 in O.S. No. 116 of 1971 shall stand dismissed, but there will be no order as to costs.

9. I may add that, under the circumstances of the case, the executing Court has to refund the money and the stamps already deposited by the auction-purchasers.

S.J. ——— *Petitions allowed.*

1. (1954) 2 M.L.J. 55 (S.C.): 1954 S.C.J. 509: (1955) 1 S.C.R. 208 : A.I.R. 1954 S.C. 349.
2. A.I.R. 1961 Bom. 224.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. S. Kailasam and Maharajan, JJ.*

Mohammad Sali .. *Appellant**

v.

Mary Gonrath Fernando and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 7, *rule* 10—*Promissory note — Executed at Tuticorin—Defendant residing at Nagercoil —Suit on note filed in Tuticorin Court on the last day of limitation—Plaintiff praying for return of plaint to be presented to Nagercoil Court—Plaint returned —Suit filed in Nagercoil Court—Plea of limitation by defendant—Suit dismissed by trial Court as barred by limitation —On appeal, suit decreed—Validity.*

S executed a promissory note in favour of *M* at Tuticorin. *S* was residing at Nagercoil. *M* filed a suit against *S* at Tuticorin on the promissory note on the last day of limitation. *S* contended that the suit should have been filed at Nagercoil. *M* prayed for the return of the plaint for presentation at the Nagercoil Court. The plaint was accordingly returned. Actually the Court at Tuticorin as well as the Court at Negercoil had jurisdictin to entertain the suit. The Tuticorin Court acted in violation of Order 7, rule 10, Civil Procedure Code, when it returned the plaint though it had jurisdiction. On the question whether the suit was barred by time at the Nagercoil Court,

Held, that the order of the Tuticorin Court being an illegal order and the plaint having been presented within time in a Court having jurisdiction, the crucial date for purposes of limitation was the date on which the plaint was presented in the Tuticorin Court and not the date on which it was represented in the Nagercoil Court. The plaint, which was presented at the Nagercoil Court, was only a continuation of the plaint which had been wrongly returned by the Tuticorin Court. The proper date on which the plaint must be taken to have been filed was the date on which it was filed in the Tuticorin Court and that date fell well within the period of limitation. [*Para.* 6.]

Cases referred to :—

Amar Nath and others v. *Hakim Rai,* A.I.R. 1929 Lah. 248 ; *Ganga Prasad Rai* v. *Ramanand Gir,* 30 I.C. 544.

Appeal against the decree of the Honourable Mr. Justice Alagiriswami dated 9th July, 1968 in S. A. No. 795 of 1964 preferred to the High Court against the decree of the District Court, Kanyakumari at Nagercoil and made in A. S. No. 11 of 1964 (O.S. No. 399 of 1959) on the file of the Court of the II Additional District Munsif, Nagercoil.

K. V. Rajagopalan, for Appellant.

M. X. Cardoza and *M. Srinivasan,* (*amicus curiae,* for Respondents.

The Judgment of the Court was delivered by

Maharajan, J.—An interesting question of law arises in this Letters Patent Appeal, which is directed against a second appellate judgment of this Court, and it arises, under the following circumstances. The plaintiff, who is the respondent in this appeal, instituted a suit in the Court of the District Munsif, Tuticorin for the recovery of monies due under a promissory note executed by the defendant, who was a resident of Nagercoil. The plaintiff alleged that the promissory note was executed at Tuticorin and that consequently the cause of action had arisen within the territorial limits of the Tuticorin Court. The suit itself was instituted on the last day of limitation. The defendant appeared in the Tuticorin Court and raised several contentions, one of which was that inasmuch as the promissory note had been executed at Nagercoil and not at Tuticorin and he himself was residing at Nagercoil, no part of the cause of action had arisen within the territorial limits of the Tuticorin Court. As many as 7 issues were framed upon the pleadings and issue No. 3 related to the territorial jurisdiction of the Tuticorin Court. But, before the trial commenced, that is to say, on 28th July, 1959, the plaintiff's agent made an endorsement on the plaint to the following effect :

" Plaintiff prays that the plaint may be returned for presentation to the Nager-

* L.P.A. No. 63 of 1969. 22nd October, 1973

coil Court where the defendant resides."

Without going into the question of jurisdiction on the merits, the Tuticorin Court accepted this request of the plaintiff and passed an order in the following terms :

"Today an endorsement has been made in the plaint. Further it is seen that the defendant resides at Nagercoil area and the entire cause of action arose at Nagercoil. Plaint is returned for presentation to the proper forum. If the plaint is not represented within the transit period allowed under law, the defendant would be entitled to claim his costs from the plaintiff. Plaint is returned. If represented within time, costs to abide by the result of the suit."

The plaint was actually returned to the plaintiff on 6th August, 1959. The plaintiff presented this plaint in the Nagercoil Court on 19th August, 1959 along with a fresh plaint. The Nagercoil Court entertained both plaints, treated the court-fee paid on the earlier plaint as court-fee due on the fresh plaint and proceeded with the trial after issuing summons to the defendant, giving an opportunity to the defendant to file an answer, framing issues, recording evidence and ultimately, holding that inasmuch as the plaint had been presented in the Nagercoil Court long after the expiry of the period of limitation, the suit was barred by time. The first appellate Court reversed this judgment and granted a decree in favour of the plaintiff. In the Second Appeal, the judgment of the first appellate Court was upheld, and against that judgment, the present Letters Patent Appeal has been filed by the defendant.

4. The question arises whether the plaint returned by the Tuticorin Court for presentation to the proper Court should be regarded as a continuation of the plaint presented in the Nagercoil Court. If it is so regarded, no question of limitation would arise. If, on the other hand, the plaint presented in the Nagercoil Court is to be treated as a fresh plaint, the suit must be held barred by limitation because on the date of presentation of the plaint in the Nagercoil, Court the period of limitation had expired.

5. Before dealing with this question, it is right to point out that all the three Courts, concurrently, held that the promissory note was executed at Tuticorin. This is a finding of fact which is binding upon the appellant herein. It would then follow that the return by the Tuticorin Court of the plaint was made on the erroneous basis that that Court had no jurisdiction to entertain the suit. It is true that as the defendant resided within the territorial limits of the Nagercoil Court, the suit could be filed in the Nagercoil Court as well. The resulting position is that both the Tuticorin Court and the Nagercoil Court had jurisdiction to entertain the suit instituted by the plaintiff. The Tuticorin Court did not record evidence as to the exact place where the promissory note was executed. Had it done so, it would have, like the Nagercoil Court, arrived at the conclusion that the promissory note had been executed at Tuticorin in which case, the Tuticorin Court would have refrained from returning the plaint. Under Order 7, rule 10 of the Civil Procedure Code. "(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.........."

6. In this case, as it transpires from the finding of the Nagercoil Court, the promissory note was executed at Tuticorin. Therefore, the Tuticorin Court had jurisdiction, equally with the Nagercoil Court, to entertain the suit. The Tuticorin Court acted in violation of Order 7, rule 10, Civil Procedure Code, when it returned the plaint although it had jurisdiction. This order being an illegal order and the plaint having been presented within time in a Court having jurisdiction, we think that the crucial date for purposes of limitation is the date on which the plaint was presented in the Tuticorin Court and not the date, on which it was represented in the Nagercoil Court. We find support for this view in a ruling of the Lahore High Court, *viz.*, *Amar Nath and others* v. *Hakim Rai*[1] where a Division Bench of that Court had held as follows : (at page 249).

"The main contention of the learned Counsel for the appellant is that the

1. A.I.R. 1929 Lah. 248.

Junior Subordinate Judge's order was passed under Order 7, rule 10, Civil Procedure Code, and that when the plaint was returned under that rule and presented to a competent Court the suit must be taken to be instituted on the date on which it is presented to the latter Court. In the present instance, however, it seems to me that Order 7, rule 10, was really not applicable at all, as the Junior Subordinate Judge had not come to any definite finding on the question of jurisdiction and was merely of opinion that there was just a possibility that the case may be outside his jurisdiction. The plaintiff also had not asked for return of the plaint under that rule but had requested that the case be transferred to a competent Court. The proper course for the Junior Subordinate Judge would have been to move the District Judge to transfer the case, but instead of doing so, he erroneously returned the plaint to be presented to the Senior Subordinate Judge. The Junior Subordinate Judge has not expressly referred to Order 7, rule 10, Civil Procedure Code, and he certainly had no jurisdiction to act under that rule as he had come to no definite finding that he had no jurisdiction to deal with the suit. There was also no question of any withdrawal of the first suit or fresh institution thereof ....
....I hold that there was no fresh institution of the suit and the suit was merely to be continued in the Court of the Senior Subordinate Judge. This view is supported by the decision in *Ganga Prasad Rai* v. *Ramanand Gir*[1] in which the facts appear to have been somewhat similar."

Though the facts of that case are not on all fours with the facts of the present case, the principle laid down in that ruling is applicable to the facts of this case. Consequently, we hold that the plaint, which was presented in the Nagercoil Court, was only a continuation of the plaint, which had been wrongly returned by the Tuticorin Court. The proper date on which the plaint must be taken to have been filed is the date on which it was filed in the Tuticorin Court and that date falls well within the period of limitation.

1. 30 I.C. 544.

We, therefore agree with the learned second appellate Judge and dismiss this Letters Patent Appeal with costs. Before parting with this case, we wish to record our appreciation of the able assistance rendered by Mr. M. Srinivasan as *amicus curiae*.

S.J. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Natarajan, JJ.*

K. E. M. Mohamed Ibrahim Marcan and another .. *Appellants* *

v.

Perumal Padayachi .. *Respondent.*

Interpretation of documents—Agreement of sale of bus with route permit—Modus operandi *of transfer not mentioned in the document—Legal obligation apparent—Agreement cannot be avoided—Deed captioned as partnership—Intention only to be a working arrangement between parties—Document only formal and not a partnership deed.*

Merely because an express provision is not made in an agreement regarding the *modus operandi* for its implementation, the legal obligation of one of the parties which is quite apparent in the agreement cannot be avoided.

All stipulations and acts which arise from and out of a written contract between the parties have to be understood pragmatically and given effect to in accordance with law. Thus understood it is reasonable to expect that the parties should follow the procedure prescribed in law for achieving their object reflected in the said contract. If the parties either due to lethargy or with some design or purpose fail to adopt such a process to give effect to the object of the contract, the contract itself cannot for that reason become illegal or invalid. [*Para.* 7.]

On the question whether a deed captioned as partnership was in reality a partnership deed between the plaintiffs and the defendant,

* A.P. No. 568 of 1967. *23rd November* 1973.

Held, that the deed was never intended to be acted upon to its logical end and there was intrinsic evidence, that it was only intended to project a working arrangment between the parties in order to protect the plaintiffs who were acting as financiers to the defendant for the conduct of his business. The deed was only a formal document executed by the parties as between themselves with no intention to follow the terms thereof or act upon it. [*Paras.* 9 *and* 13.]

Cases referred to :—

Viswanatham Pillai v. *Shanmugham*, I.L.R. (1966) 2 Mad. 477: (1966) 1 M.L.J. 363: 79 L.W. 284 : A.I.R. 1967 Mad. 100 ; *K. M. Viswanatha Pillai* v. *K. M. Shanmugham Pillai*, (1969) 1 S.C.J. 706 : (1969) 1 M.L.J. (S.C.) 86 : (1969) 1 An.W.R. (S.C.) 86 : A.I.R. 1969 S.C. 493.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, dated 29th March, 1967, and passed in O.S. No. 30 of 1966.

K. Yamunan for Appellants.

K. Ramaswami and *Mrs. Sarojini Bai*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs are the appellants. The defendant was a transport operator. He had two route permits covering Cuddalore to Ulundurpet and Cuddalore to Kachirapalayam, and was plying MDY 3870 and MDY 4396 respectively on the above routes. He sought financial assistance from the plaintiffs. After discussions the plaintiffs, under Exhibit A-1, dated 14th May, 1964, entered into a sale agreement in respect of the bus MDY 3870 for a consideration of Rs. 40,000. Under Exhibit A-1 it was agreed that the plaintiffs should take delivery of the bus from the defendant after paying the amounts due under hire purchase to one Srimathi Nani Kavar Bai. The defendant agreed to sign the necessary records for transferring the registration certificate of the vehicle and also seek for the transfer of the permit in favour of the plaintiffs. But immediately after entering into the agreement the plaintiffs understood that there was some dispute regarding the route permit Cuddalore to Ulunderpet for which purpose MDY 3870 was utilised. Therefore, on the next day a second agreement Exhibit A-2, dated 15th May, 1964 was entered into in supersession of the first agreement Exhibit A-1. Under this agreement the defendant agreed to sell his other vehicle MDY 4396 and in consequence stipulated to obtain a transfer of the route permit in connection with the said vehicle over the route Cuddalore to Kachirapalayam. The consideration for this sale was fixed at Rs. 80,000 which included the sum of Rs. 40,000 agreed to be paid by the plaintiffs under Exhibit A-1. In order to safeguard their interests as financiers the plainiffs, as an interim measure and by way of abundant caution, entered into a third agreement Exhibit A-3 and captioned it as a deed of partnership on the same day, namely, 15th May, 1964. Under this deed it was provisionally agreed that the defendant and the plaintiffs would continue the transport business previously carried on by the defendant in his individual name in partnership under the name and style of Andavar Bus Service. The parties agreed to take such steps as were necessary to have the permits transferred in favour and for the benefit of the partnership. The sum of Rs. 40,000 which was the consideration for Exhibit A-1 was to be treated as capital of the plaintiffs and they were to be in the day to day management of the business. The defendant was to be paid a monthly a sum of Rs. 100 towards salary and for being in charge of the workshop in addition to his half share of profits in the business. All capital expenses in relation to each of the routes Cuddalore to Kachirapalayam and Cuddalore to Ulundurpet were to be kept separately. The plaintiffs agreed to finance the partnership in connection with the repairing of the vehicles and for replacement of the vehicles. Accounts were to be prepared every month and copies were to be communicated to the partners which shall be audited by a Chartered Accountant at the end of each year. The period of the partnership was agreed to as five years and on the expiry of the said period or in the event of earlier dissolution, the permit along with the bus on the route Cuddalore to Ulunteprus shall be taken by the plaintiff and

the other permit and the bus subject to the payment of any capital expenditure incurred was to be taken by the defendant. This partnership was signed at Nagapattinam where the plaintiffs resided.

2. The plaintiffs' case is that the partnership agreement, Exhibit A-3, dated 15th May, 1964 which was almost contemporaneous with the agreement for purchase of the bus MDY 4396 was intended only as an expedient or as a means to smoothen the way of transfer of the route permits as also the vehicles covered by the agreement Exhibit A-2 and that the partnership agreement was only understood as an interim arrangement for effecting such transfers of ownership and permits in favour of the partnership business, Andavar Bus Service. The plaintiffs took over the management of the partnership business which was hitherto run by the defendant and they were maintaining the accounts thereof. In fact, the plaintiffs made further advances to the defendant with regard to the two buses from time to time and such advances were for either effecting repairs or for paying taxes and for other urgent necessities of the defendant. It is not in dispute that the bus MDY 4396 referred to in Exhibit A-2 was replaced by the bus MDS 5216 for which purchase also the plaintiffs claim to have advanced moneys. When this was the position, the defendant could not succeed in retaining the permit obtained by him in respect of the bus MDY 3870 running on the route Cuddalore to Ulundurpet as the State Transport Appellate Tribunal, by its order, dated 27th September, 1965 under Exhibit A-4 cancelled the same. After the defendant lost one of the permits which was to be transferred to the plaintiffs under the agreement Exhibit A-2 he became recalcitrant and was not apparently interested in performing his part of the contract. But, in order to secure their rights, the plaintiffs had to help the defendant when the bus MDS 5216, which was running between Cuddalore and Kachirapalayam, was attached by one Brindavathi Ammal pursuant to a money debt owed by the defendant to her. In fact the plaintiffs got the bus released from the attachment effected in the above suit. The defendant filed an application for appointment of a receiver and obtained release of the above vehicle from attachment. In those proceedings the plaintiffs assisted the defendant having regard to the responsibility undertaken by the plaintiffs with the defendant under Exhibits A-2 and A-4. Contemporaneous with the proceedings whereunder the bus MDS 5216 was attached by Brindavathi Ammal and was released, the plaintiffs obtained from the defendant a hire-purchase agreement so as to further safeguard their rights as against the defendant in general and in particular against the bus MDS 5216. The plaintiffs thereafter stood as sureties in the suit filed by Brindavathi Ammal and released the bus MDS 5216 from attachment in the suit. By that time the defendant is said to have received large amounts to the tune of Rs. 65,000 besides having had the benefit of the release of the bus from attachment on the security given by the plaintiffs in Brindavathi Ammal's suit. But it is the case of the plaintiffs that the defendant with a designed and improper motive induced one Narayanaswami Iyer to cause the bus once again to be attached in execution of a decree obtained by Narayanaswami Iyer. The plaintiffs unsuccessfully intervened with a claim petition and having regard to the large amounts by then advanced by them the plaintiffs were again compelled to pay a sum of Rs. 3,332-70 to Narayanaswami Iyer for discharging the decree. This was done in order to avoid the risk of losing possession of the bus and also the only route permit which was by then subsisting. The defendant further perpetrated his design to avoid his responsibilities by submitting to a decree in the suit filed by Brindavathi Ammal; in the result the plaintiffs' personal bond which they gave in Brindavathi Ammal's suit became enforceable.

3. In the above circumstances and as the defendant lost his route permit between Cuddalore and Ulundurpet the plaintiffs have come to Court for specific performance of the contract to sell the bus MDS. 5216 which is a substitute for the bus MDY 4396 under the terms of Exhibit A-2, and for a direction to the defendant to apply for transfer of the route permit between Cuddalore and Kachirapalayam for a consideration of Rs. 80,000. The plaintiffs state that they

have advanced a sum of Rs. 65,000 pursuant to the said agreement and that they are ready and willing to pay the balance out of 80,000 to get a conveyance of the bus and the permit transferred in their names. The plaintiffs claim that the hire-purchase agreement which was taken at the time when they gave personal security in Brindavathi Ammal's suit was further perfected by entering the same in the registration certificate in the name of their relation, One A. M. Hamid Maracair. The plaintiffs claim that the bus is subject to the said hire-purchase agreement. They caused a notice to be issued under Exhibits A-38 and A-39 setting out the above facts, but the defendant repudiated the same under Exhibit A-40 and claimed that the plaintiffs are not entitled to specific performance of the contract under Exhibit A-2 and that the partnership deed was genuine instrument and that the plaintiffs are not entitled to any relief. The plaintiffs allege that they have performed their part of the contract under the agreement Exhibit A-2 and they are ready and willing to perform the subsisting obligations under it. In any event and in the alternative they would state that if they are not entitled to the relief of specific performance, they would be entitled to the sum of about Rs 65,000 odd which they have actually paid to the defendant and a sum of Rs. 35,000 as damages. In the above sequence the suit was laid for one or the other of the reliefs stated in the plaint.

4. The defendant in his written statement admits that he was faced with acute financial stringency and he had to approach the plaintiffs for succour and obtained advances so as to pay off as far as possible his creditors. His case is that Exhibits A-1 and A-2 were entered into at a time when one of the buses was actually seized by one Nalini Kaval Bai under a hire-purchase agreement in her favour and that when he was in extreme financial difficulties. According to the defendant, the partnership agreement was forced out of him and that he was pursuaded to enter into by pressure and undue influence. His further case is that the agreements under Exhibits A-1 and A-2. (even if it is assumed that Exhibit A-2 is in supersession of Exhibit A-1) are two agreements which are unlawful and unenforceable in the eye of law and that the partnership deed which superseded the above agreements was the only document which evidences the mutual terms and conditions under which the parties should act. The plaintiffs having taken an improper advantage of the defendant's financial position and decrees, cannot retrogade and place any reliance upon the agreements Exhibits A-1 and A-2 when such agreements have been virtually superseded by the partnership agreement Exhibit A-3 and the plaintiffs are under a legal obligation to pay off all the debts of the defendant and continue the partnership and be bound by the terms set out thereto. The plaintiffs therefore are not entitled to the relief of specific performance as if Exhibit A-2 or Exhibit A-1 which according to the defendant is superseded by Exhibit A-2 is still in force and enforceable. The defendant would allege that he lost his route permit relating to Cuddalore to Ulundurpet because of the attitude of the plaintiffs who would not take up the matter further to the higher hierarchy of Courts. The defendant in effect alleged that the terms of the partnership were implemented in that the vilasam of the bus service was changed and the plaintiffs took the management of the partnership business by keeping accounts, by making themselves responsible for daily collections, by making repairs and replacements to the bus., etc. The defendant admits that he was paid a sum of Rs. 100 as salary and was alleged to draw a sum of Rs. 200 per month out of his share in the expected profits. The defendant however would add that the illegal partnership was acted upon the and plaintiffs cannot take advantage of their own wrong in not having performed their part of the obligations springing from the deed of partnership. It was due to the unhelpful attitude of the plaintiffs that Brindavathi Ammal and Narayana Iyer filed their suits and as the defendant caused self-effacement as an individual bus-operator and as it was Andavar Bus Service which was running the transport business as a partnership, the plaintiffs are not entitled to any relief. The defendant denied that he signed any hire-purchase in the registration certificate, and even if it was made, it was by reason of the plaintiffs taking advantage of a forged document

in support of the said hire-purchase agreement. In any event it is said that the plaintiffs having taken the bus MDS 5216 into their possession in the suit filed by Narayana Iyer, they should be deemed to be in custody of it even now and are accountable to the income and profits therefrom by reason of the permit, which was attached to the bus at the time when the plaintiffs obtained possession of the same in Narayana Iyer's suit. It was in those circumstances the plaintiffs got the bus MDF 1991 on hire-purchase agreement so that they could validly exploit his permit from Cuddalore to Kachirapalayam and averted the calamity of a total cancellation of the permit for non-performance by the permit-holder. It is impliedly conceded that the route permit always remained in the name of the defendant. The sheet-anchor of the defendant's case is that the agreements Exhibit A-1 and A-2 are unenforceable in the eye of law and it was only the final partnership agreement that was intended to be operative and as the defendant is willing to act in accordance therewith the plaintiffs are not entitled to a suit for specific performance of the agreement Exhibit A-2. The claim for damages is denied.

5. In the reply statement the plaintiffs reiterate their original stand. The parties went to trial and the plaintiffs examined a clerk of theirs and filed their account books in furtherance of their stand. But the defendant did not produce any relevant documentary evidence, nor did he examine himself. On the basis of the above pleadings the learned Subordinate Judge of Cuddalore framed the following issues :

1. Whether the agreement, dated 15th May, 1964 is illegal and void ?

2. Whether the defendant's signature to the agreement were taken by compulsion ?

3. Whether the suit agreement of sale has been superseded by the partnership agreement ?

4. Whether the suit agreement has been abandoned as contended by the defendant ?

5. Whether the plaintiffs are entitled to compel the defendant to join in the application for transfer of the route permit ?

6. Whether the plaintiffs are entitled to claim any damages, and if so, to what amount ?

7. To what relief are the plaintiffs entitled.

6. The learned Subordinate Judge mainly addressed himself to the question whether the agreement of sale under Exhibit A-2 was superseded by the so called partnership agreement Exhibit A-3 and found that the terms and conditions as reflected in Exhibit A-2 were abandoned or waived by reason of the subsequent agreement of partnership. Alternatively he considered the legality and enforceability of Exhibit A-2 and relying upon a decision of this Court reported in *Viswanatham Pillai* v. *Shanmugham*[1] found that Exhibit A-1 which was later revised under Exhibit A-2 is unenforceable in the eye of law and therefore void. In the result the suit for specific performance was dismissed. Even the alternative claim for return of the amount admittedly expended by the plaintiffs for the benefit of the defendant was negatived. Consequently the claim for damages representing the alleged loss sustained by the plaintiffs by reason of the breach of contract committed by the defendant was held to be not substantiated. We are unable to agree with the material findings so rendered by the learned Subordinate Judge.

7. We shall take up the first question regarding enforceability of Exhibit A 2. The principle laid down by this Court in *Viswanatham Pillai* v. *Shanmugham*[1] was expressly dissented by the Supreme Court in *K. M. Viswanatha Pillai* v. *K. M. Shanmugham Pillai*[2]. Their Lordships of the Supreme Court were of the view that under the provisions of the Motor Vehicles Act, 1939 it is not necessary for the owner himself to obtain the permit and that the Act requires the owner of the transport vehicle to use the vehicle in accordance with the conditions of the permit and that the definition of the permit itself shows that all permits need not be in the name of the owner because the

1. (1966) 1 M.L.J. 363: 79 L.W. 284: I.L.R. (1966) 2 Mad. 477: A.I.R. 1967 Mad. 100.
2. (1969) 1 S.C.J. 706: (1969) 1 An.W.R. 86 : (1969) 1 M.L.J. (S.C.) 86 : A.I.R. 1969 S.C. 493.

latter part of the definition shows that it is only in the case of a private carrier or a public carrier that a permit has to be in the owner's name. They laid down categorically that the Act does not expressly or by implication ban benami transactions or persons owning buses benami and applying for permits on that basis. On the basis of this pronouncement it cannot be said that Exhibit A-2, which provides for a sale of the bus together with the route permit thereon by the defendant in favour of the plaintiffs, is an illegal transaction which cannot be countenanced in the eye of law. The learned Subordinate Judge was of the view that prior sanction of the Regional Transport Authority was necessary before the parties could venture as they attempted under Exhibit A-2. He also expressed that there was nothing intrinsic in Exhibit A-2 which compelled the parties to obtain approval or sanction of the Regional Transport Authority with regard to the transfer of the route permit from the name of the defendant to the plaintiffs. If an agreement as adumbrated in Exhibit A-2 is enforceable in the eye of law, the mere fact that the said agreement does not contain obvious stipulations regarding achievement of the purpose for which the agreement was entered into would not make such an agreement any the less enforceable and a valid agreement. In view of the ratio of the Supreme Court in *K. M. Viswanatha Pillai* v. *K. M. Shanmugham Pillai*[1] it does not lie in the mouth of the respondent now to contend that an express recital, in the agreement of sale of a bus coupled with the route permit, but not referring to the method to be adopted later for effectuating the intention of the said agreement would make it an insipid or a void one. Under Exhibit A-2 there is by necessary implication an obligation on the part of the defendant to join with the plaintiffs and make an application to the appropriate authority for transfer of the route permit in favour of the plaintiffs. Merely because an express provision is not made in the said agreement, regarding the *modus operandi* for its implementation the legal obligation on the part of the defendant, which is quite apparent in Exhibit A-2 cannot be avoided. The fact that the defendant due to reasons best known to himself did not join with the plaintiffs in the matter of securing the transfer of the route permit from his name to the name of the plaintiffs cannot, in our view, have any impact on the rights of parties which flow from Exhibit A-2. All stipulations and acts which arise from and out of a written contract between the parties have to be understood pragmatically and given effect to in accordance with law. Thus understood, it is reasonable to expect that the parties should follow the procedure prescribed in law for achieving their object reflected in the said contract. If the parties either due to lethargy or with some design or purpose fail to adopt such a process to give effect to the object of the contract the contract itself cannot become illegal or invalid. We are therefore unable to agree with the learned Subordinate Judge that Exhibit A-2 is unenforceable, illegal and invalid right from its inception.

1. (1969) 1 S.C.J. 706: (1969) 1 M.L.J. (S.C.) 86: (1969) 1 An.W.R. 86 : A.I.R. 1969 S.C. 493.

8. This leads on to the question whether the partnership deed so prominently put in the forefront by the defendant did supersede the agreement Exhibit A-2. Mr. Ramaswami, learned Counsel for the respondent, while attempting to sustain the judgment of the learned Subordinate Judge, very strenuously urges that Exhibit A-3 the partnership deed is the real contract between the parties and having regard to the sequence of time Exhibit A-3 should be deemed to have replaced or substituted the earlier agreements and in particular Exhibit A-2, as they cannot co-exist. Much reliance was placed upon clause 12 in Exhibit A-3 which provides for dissolution of the partnership and whereunder the permits along with the bus have to be taken respectively by one or the other of the contracting parties. Reference was made to the observation of the lower Court that it was brought into existence only with the intention to enable the appellants to have a hold on the buses and the routes and for the recovery of the amounts advanced by them and that the partnership deed Exhibit A-3 was the transaction which was intended to be acted upon. It was therefore said that the suit for specific performance of the contract which could be spelt from Exhibit A-2 or the alternative claim for recovery

of the amounts advanced and damages for non-performance of the contract as reflected in Exhibit A-2 is not maintainable. Learned Counsel for the appellants contending *contra* and relying upon the pleadings and the correspondence that passed before suit maintained that Exhibit A-3 was only an interim working arrangement and at no time the parties desired to give up their rights and obligations under Exhibit A-2.

9. We are of the view that the partnership deed was never intended to be acted to its logical end and there is intrinsic evidence, as is seen from the conduct of the parties and the documents filed in the case, that it was only intended to project a working arrangement between the parties in order to protect the plaintiffs-appellants who were acting as financiers and who undertook to advance and did advance at various stages large amounts to the respondent for the conduct of his business. The pattern of accounts kept and the methodology adopted by the parties do not establish the jural relationship of partners *inter se*. In Exhibit A-6, dated 13th July, 1964, which was long after the date of the alleged partnership, the respondent described himself as the proprietor of S.R.P.B.S. Bus Service. This was a promissory note executed by the defendant-respondent in favour of the plaintiffs-appellants and this was towards the expenses which the defendant incurred in respect of the bus MDS 5216 and for meeting his family expenses. One would expect the defendant who is a knowing person to have avoided the description "Proprietor, S.R.P.B.S. Bus Service" which relates to MDS 5216 if it was unequivocally agreed that the bus should belong to the so called partnership business of Andavar Bus Service, which was the name and style the parties agreed to give their alleged joint enterprise which is reflected in the formal agreement Exhibit A-3.

10. In Exhibit A-14 which was a personal security bond given by the appellants-plaintiffs, to the knowledge of the defendant, they described the bus MDS 5216 as bearing the name of Andavar Bus belonging to the defendant. One would expect a real description in Exhibit A-14 which was a security bond executed in favour of the Subordinate Judge's Court, Cuddalore, in a litigation between the defendant and his creditor Brindavathi Ammal. That the running of the bus undertaken by the plaintiffs as financiers was never intended in pursuance of the so called partnership agreement Exhibit A-3 is clear from Exhibit A-32 wherein the defendant admitted that he would not consent to the presentation of joint application for transfer of the permits without settlement of accounts. He used, no doubt, the word 'partnership' in Exhibit A-32 read with Exhibit A-36; but his conduct is clear that he was only interested in sharing the profits of the undertaking without imprinting on himself in conjunction with the plaintiffs the badge of partnership as is known to law. In Exhibit A-36 he says that his share of income upto the 17th July, 1965, was paid to him. Though he refers to the expressions 'partner' and 'partnership' the intention which is manifest in these and other documents is that the defendant understood the transaction only as a financial agreement and not as a partnership simpliciter. The plaintiffs themselves filed a petition Exhibit A-42 in another civil proceeding between the defendant and his creditor Narayanaswami Iyer. Narayanaswami Iyer filed O.S. No. 139 of 1965 on the file of the Court of the District Munsif of Cuddalore and obtained an order of attachment before judgment of the bus MDS 5216 as belonging to the defendant. The claim petition filed by the plaintiffs to raise the attachment was dismissed and in Exhibit A-52 the finding of the learned District Munsif in the claim petition was that the bus absolutely belonged to the defendant. The contention of the defendant in that suit was that the partnership is illegal and that the judgment-debtor was solely interested in the bus and no one else had any subsisting interest therein. Reference was also made to the admissions in the earlier documents wherein it was said that the bus belonged to the defendant. In fact, the claim petition was dismissed.

11. Exhibit A-50 was an affidavit filed by the defendant himself in the suit filed by Narayanaswami Iyer. While opposing the application for attachment before judgment the defendant would state that

the bus MDS 5216 was his stage carriage bus, that it was running between Cuddalore and Kachirapalayam and that the registration certificate for the vehicle was in his name and the route permit was granted to him as owner and operator. He also referred to the fact that the bus was left with two sureties, meaning thereby the representatives of the appellant, and he alleged that the said sureties were colluding with his creditors and therefore a receiver should be appointed. This conduct is absolutely inconsistent with the theory of partnership set out by the defendant and contained in Exhibit A-53. The defendant did not care to go into the box, but was satisfied to remain outside it. The best evidence which he could make available to Court by deposing in person was not made available. He was obviously not prepared to face cross-examination in the witness box which would bring out in truthful colours the real jural relationship between the parties.

12. We shall now consider the nature and purport of the account books which were disclosed in the trial Court to see whether Exhibit A-3 was acted upon. Exhibits A-7 and A-8 are the day books of Ranga Parthasarathy Bus Service, which admittedly was the trading style of the defendant. Exhibits A-45 to A-48 are separate ledgers maintained by the plaintiffs in connection with the running of the three buses MDY 3870, MDY 4396 and MDS 5216. It is nobody's case that these ledgers were captioned as account books relating to Andavar Bus Service, which according to Exhibit A-3. was the trading style of the intended partnership. These exhibits clinchingly establish that the plaintiffs as financiers who undertook to run the buses, maintained these ledgers to show the collections and the expenses relating to each of these buses and it was never the intention of the parties that the profits and losses relating to these buses and the expenses incurred thereto were intended to be shared by the partners in any proportion agreed to under Exhibit A-3. Again, Exhibits A-9 and A-12 do not further the case of the defendant. Exhibit A-9 is a ledger for the business dealings which the parties had as between themselves and Exhibit A-12 is a ledger in which the personal dealings of the plaintiffs are entered into. If really the parties expected and agreed that they should run all the available buses with the permits thereto as if a partnership was entered into between them, there was no necessity for two ledgers with reference to the defendant one relating to his business dealings and the other for his personal dealings. Though more than a year elapsed before the suit was filed, accounts were never closed and no profit and loss statement was struck. This consistent conduct of the parties immediately after the so-called partnership agreement, is inconsistent with a definite agreed jural relationship between them as partners under the Partnership Act.

13. Under Exhibit A-3 there are the clauses which knit the parties as partners and under which they oblige themselves reciprocally to be bound by them. There is no acceptable evidence to show that the name and style of the business was changed to Andavar Bus Service though this is referred to in Clause 1. No profit and loss statement has been prepared and there is no evidence to show that there was a sharing of the profits or losses as the case may be between the partners in the ratio of 2 : 1 : 1 as provided for in clause 3. On the other hand the defendant says that he was paid his share of his income as seen from his allegation in Exhibit A-36, whilst there is no saying as to whether accounts were struck for purposes of division of the net profits or losses as the case may be. Clause 11 provides that accounts shall be prepared every month and copies thereof communicated to all partners and they shall be audited by a Chartered Accountant at the end of the year. Nothing has been done and in any event no one speaks about the follow-up procedure pursuant to this clause. A mere reference to clause 12 which provides for dissolution of the partnership at the end of five years, would not in any way improve the case of the defendant. This clause is a usual clause provided in a deed of partnership if it is intended that the partnership should be for a period. But in order to establish that the partnership was running as agreed to by them under Exhibit A-3 the defendant should prove to the satisfaction of the Court that they did abide by the conditions and stipulations under

the deed and were respecting the rights and obligations created thereunder in terms thereof. We have already referred to the fact that the defendant did not go into the box to assert any one of the above circumstances. We have already seen the fate of the permit relating to Cuddalore and Ulundurpet. After the Appellate Tribunal set aside the permit granted to the defendant, no steps were taken by the parties to modify the terms of the partnership or to register their rights. This is sufficient indicia to show that the permits set out in clause 12 of the so-called partnership agreement Exhibit A-3 was understood only to remain on paper and not intended to be acted upon. Even as regards the bus which was put on the route Cuddalore to Kachirapalayam, the hire-purchase holder is said to have seized the bus, though it is the case of the defendant that the hire-purchase holder is none else than a nominee of the plaintiffs. After such seizure the defendant's case is that he had to make his own arrangements for running the bus on the route by purchasing a new bus on his own volition. This again is a pointer to the fact that Exhibit A-3 could not have been understood by the parties as a partnership deed, but only as an ineffectual instrument to serve only as a piece of evidence to show that the plaintiffs advanced moneys to the defendant under certain circumstances and for purposes of recovery a working arrangement was entered into as between them.

14. The above features in this case militate against the existence of any partnership as between the parties. Weighing all the facts as seen from the documentary evidence in this case, we are unable to see any element of mutuality as between the parties, which is an essential precondition for the subsistence and continuance of a partnership. In every partnership, each partner is the agent of the other and has the authority to act for the other. But the circumstances disclosed do not justify the conclusion that each party was acting for the other in the instant case. On the other hand each party was acting independently of the other without any mutual consultation and obviously for the furtherance of their own interests. Whilst the plaintiffs were interested as financiers to get their money back as also a reasonable return thereof, the defendant was not interested in repaying the amounts borrowed aud was evading and was making his own arrangements for the running of the bus from Cuddalore to Kachirapalayam without reference to the plaintiffs. We have no hesitation therefore, to hold that Exhibit A-3 was only a formal document executed by the parties as between themselves with no intention to follow the terms thereof or act upon it.

15. If, therefore, there was no partnership and if the legal relationship only projects a case of financier and borrower, then the only question which remains for consideration is, what relief the plaintiffs could get in this appeal.

16. The plaintiffs have made an alternative claim for the return of the sum of about Rs. 65,000 which they say they have paid to the defendant, and in addition they have claimed a sum of Rs. 35,000 as damages. They base their cause of action on the agreement Exhibit A-2. We have already held that Exhibit A-2 is a legal document. The question is whether in the peculiar circumstances it is enforceable as on date and a decree for specific performance could rest on the recitals therein.

17. In so far as the bus MDY 3870 is concerned, which was running on the route Cuddalore to Ulundurpet, the permit has been set aside. Therefore there is no question of the relative permit in respect of the sale of that bus being subjected to a decree for specific performance. As regards the bus MDY 4396 replaced by bus MDS 5216 running on the route Cuddalore to Kachirapalayam, this is not available as on date with the defendant for him to sell the same after accounts are settled between him and the financiers, namely, the plaintiffs. We have already adverted to the fact that there are two versions as regards this bus MDS 5216. The plaintiffs' case is that under a hire-purchase agreement this bus was seized by the hire-purchase holder and they have nothing to do with it. On the other hand, the defendant's case is that the hire-purchase holder is the nominee of the plaintiffs and that in reality the bus is in the custody of the

plaintiffs and that they are wrongfully utilising the same for their exclusive advantage and that such an act amounts to an act of vandalism on the part of the plaintiffs. Neither the plaintiffs nor the defendants have urged seriously before us and convinced us as to in whose custody the said motor vehicle is. It is unnecessary for us to deal at this stage with this aspect in the view that we intend taking. As it is settled law that no specific perfo mance of a contract, thoug i it is not vitiated by f aud or mis ep esentation, can be g anted if it could give an unfair advantage to the plaintiffs and whe e the pu pose of the contract would involve some ha dship on the defendant which he did not fo esee, we are not inclined to g ant a dec ee fo specific perfo mance. In our view, the plaintiffs would be entitled to the alternative relief for return of the moneys advanced. The claim for damages, excepting for a plea raised in the plaint, has not been fu thered or established in the instant case. The plaintiffs, therefore, would not be entitled to damages in the exorbitant sum of Rs. 35,000 fo which no proof has been adduced and no effo t has been made to substantiate it in a manner known to law.

18. After reviewing the entire material and after hearing arguments we are of the view that the plaintiffs would only be entitled to a decree fo the retu n of moneys which they advanced to the defendant in the course of the wo king of the ar angement ente ed into between them in relation to the two buses MDY 3870 and MDY 4396 which was later substituted by MDS 5216. The lower Cou t did not adve t to this aspect, but chose to dismiss the suit on the only g ound that Exhibit A-2 was not enfo ceable and was illegal. As the quantification of the amount to which the plaintiffs would be entitled to would depend upon a sc utiny of the accounts as between the parties which was al eady filed by them into Court and as we a e not inclined to unde take such an investigation at this end in appeal, the only cou se left open is to remit the subject-matter to the Court of the Subordinate Judge, Cuddalo e, for a realistic dete mi iation of the amount actually due and payable by the defendant to the plaintiffs i i the cou se of their dealings as financiers with him.

19. Whilst therefore setting aside the judgment and decree of the learned Subordinate Judge and allowing the appeal, we remit the subject-matter to the t ial Court for the purpose of dete mining the actual amount due by the defendant to the plaintiffs and thereafter grant a decree to them. The evidence already on record shall be the only basis for dete mination and qualification of the amount due and payable by the defendant to the plaintiffs.

20. As the plaintiffs have only succeeded in part and as the matter is still to be investigated on remit, each party will bear their own costs. In view of the order of remit, the Court-fee shall be refunded to the plaintiff in the usual manner.

S.J. *Appeal allowed.*

[END OF VOLUME (1974) 1 M.L.J. (REPORTS).]